COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 4, 145, and 147

RIN 3038-AD30

Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission is adopting amendments to its existing part 4 regulations and promulgating one new regulation regarding Commodity Pool Operators and Commodity Trading Advisors. The Commission is also adopting new data collections for CPOs and CTAs that are consistent with a data collection required under the Dodd-Frank Act for entities registered with both the Commission and the Securities and Exchange Commission. The adopted amendments rescind the exemption from registration; rescind relief from the certification requirement for annual reports provided to operators of certain pools offered only to qualified eligible persons ("QEPs; modify the criteria for claiming relief); and require the annual filing of notices claiming exemptive relief under several sections of the Commission's regulations. Finally, the adopted amendments include new risk disclosure requirements for CPOs and CTAs regarding swap transactions.

DATES: *Effective dates*: This final rule is effective on [INSERT DATE 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER], except for the amendments to § 4.27, which shall become effective on July 2, 2012.

Compliance dates: Compliance with § 4.27 shall be required by not later than September 15, 2012, for a CPO having at least $5 billion in assets under management, and by not later than December 14, 2012, for all other registered CPOs and all CTAs. Compliance with § 4.5 for registration

purposes only shall be required not later than the later of December 31, 2012, or 60 days after the effective date of the final rulemaking further defining the term "swap," which the Commission will publish in the Federal Register at a future date. Entities required to register due to the amendments to § 4.5 shall be subject to the Commission's recordkeeping, reporting, and disclosure requirements pursuant to part 4 of the Commission's regulations within 60 days following the effectiveness of a final rule implementing the Commission's proposed harmonization effort pursuant to the concurrent proposed rulemaking. CPOs claiming exemption under § 4.13(a)(4) shall be required to comply with the rescission of § 4.13(a)(4) by December 31, 2012; however, compliance shall be required for all other CPOs on [INSERT DATE 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]. Compliance with all other amendments, not otherwise specified above, shall be required by December 31, 2012.

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SUPPLEMENTARY INFORMATION:

I. Background on the Proposal to Amend the Registration and Compliance Obligations for CPOs and CTAs

A. Statutory and Regulatory Background

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[1] The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, inter alia, enhancing the Commodity Futures Trading Commission's (the "Commission" or "CFTC") rulemaking and enforcement authorities with respect to all registered entities and intermediaries subject to the Commission's oversight.

The preamble of the Dodd-Frank Act explicitly states that the purpose of the legislation is:

> To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.[2]

Pursuant to this stated objective, the Dodd-Frank Act has expanded the scope of federal financial regulation to include instruments such as swaps, enhanced the rulemaking authorities of existing federal financial regulatory agencies including the Commission and the Securities and Exchange Commission ("SEC"), and created new financial regulatory entities.

In addition to the expansion of the Commission's jurisdiction to include swaps under Title VII of the Dodd-Frank Act, Title I of the Dodd-Frank Act created the Financial Stability Oversight Council ("FSOC").[3] The FSOC is composed of the leaders of various state and federal financial regulators and is charged with identifying risks to the financial stability of the United States, promoting market discipline, and responding to emerging threats to the stability of the country's

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[1] See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm.
[2] Id.
[3] See section 111 of the Dodd-Frank Act.

financial system.[4] The Dodd-Frank Act anticipates that the FSOC will be supported in these responsibilities by the federal financial regulatory agencies.[5] The Commission is among those agencies that could be asked to provide information necessary for the FSOC to perform its statutorily mandated duties.[6]

Title IV of the Dodd-Frank Act requires advisers to large private funds[7] to register with the SEC.[8] Through this registration requirement, Congress sought to make available to the SEC "information regarding [the] size, strategies and positions" of large private funds, which Congress believed "could be crucial to regulatory attempts to deal with a future crisis."[9] In section 404 of the Dodd-Frank Act, Congress amended section 204(b) of the Investment Advisers Act to direct the SEC to require private fund advisers registered solely with the SEC[10] to file reports containing such information as is deemed necessary and appropriate in the public interest and for investor

[4] See section 112(a)(1)(A) of the Dodd-Frank Act.
[5] See sections 112(a)(2)(A) and 112(d)(1) of the Dodd-Frank Act.
[6] See section 112(d)(1) of the Dodd-Frank Act.
[7] Section 202(a)(29) of the Investment Advisers Act of 1940 ("Investment Advisers Act") defines the term "private fund" as "an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3), but for section 3(c)(1) or 3(c)(7) of that Act." 15 U.S.C. 80a-3(c)(1), 80a-3(c)(7). Section 3(c)(1) of the Investment Company Act provides an exclusion from the definition of "investment company" for any "issuer whose outstanding securities (other than short term paper) are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities." 15 U.S.C. 80a-3(c)(1). Section 3(c)(7) of the Investment Company Act provides an exclusion from the definition of "investment company" for any "issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers, and which is not making and does not at that time propose to make a public offering of such securities." 15 U.S.C. 80a-3(c)(7). The term "qualified purchaser" is defined in section 2(a)(51) of the Investment Company Act. See 15 U.S.C. 80a-2(a)(51).
[8] The Dodd-Frank Act requires private fund adviser registration by amending section 203(b)(3) of the Advisers Act to repeal the exemption from registration for any adviser that during the course of the preceding 12 months had fewer than 15 clients and neither held itself out to the public as an investment adviser nor advised any registered investment company or business development company. See section 403 of the Dodd-Frank Act. There are exemptions from this registration requirement for advisers to venture capital funds and advisers to private funds with less than $150 million in assets under management in the United States. There also is an exemption for foreign advisers with less than $25 million in assets under management from the United States and fewer than 15 U.S. clients and private fund investors. See sections 402, 407 and 408 of the Dodd-Frank Act.
[9] See S. CONF. REP. NO. 111-176, at 38 (2010).
[10] In this release, the term "private fund adviser" means any investment adviser that is (i) registered or required to be registered with the SEC (including any investment adviser that is also registered or required to be registered with the CFTC as a CPO or CTA) and (ii) advises one or more private funds (including any commodity pools that satisfy the definition of "private fund").

protection or for the assessment of systemic risk. These reports and records must include a description of certain prescribed information, such as the amount of assets under management, use of leverage, counterparty credit risk exposure, and trading and investment positions for each private fund advised by the adviser.[11] Section 406 of the Dodd-Frank Act also requires that the rules establishing the form and content of reports filed by private fund advisers that are dually registered with the SEC and the CFTC be issued jointly by both agencies after consultation with the FSOC.[12]

The Commodity Exchange Act ("CEA")[13] authorizes the Commission to register Commodity Pool Operators ("CPOs") and Commodity Trading Advisors ("CTAs"),[14] exclude any entity from registration as a CPO or CTA,[15] and require "[e]very commodity trading advisor and commodity pool operator registered under [the CEA to] maintain books and records and file such reports in such form and manner as may be prescribed by the Commission."[16] The Commission also has the authority to include within or exclude from the definitions of "commodity pool," "commodity pool operator," and "commodity trading advisor" any entity "if the Commission determines that the rule or regulation will effectuate the purposes of the CEA.[17] In addition, the Commission has the authority to "make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate the provisions or to

[11] See section 404 of the Dodd-Frank Act.
[12] See section 406 of the Dodd-Frank Act.
[13] 7 U.S.C. 1, et. seq.
[14] 7 U.S.C. 6m.
[15] 7 U.S.C. 1a(11) and 1a(12).
[16] 7 U.S.C. 6n(3)(A). Under part 4 of the Commission's regulations, entities registered as CPOs have reporting obligations with respect to their operated pools. See 17 CFR. 4.22. Although CTAs have recordkeeping obligations under part 4, the Commission has not required reporting by CTAs, See generally, 17 CFR. part 4.
[17] 7 U.S.C. 1a(10), 1a(11), 1a(12).

accomplish any of the purposes of [the CEA]."[18] The Commission's discretionary authority to exclude or exempt persons from registration was intended to be exercised "to exempt from registration those persons who otherwise meet the criteria for registration . . . if, in the opinion of the Commission, there is no substantial public interest to be served by the registration."[19] It is pursuant to this authority that the Commission has promulgated the various exemptions from registration as a CPO that are enumerated in § 4.13 of its regulations as well as the exclusions from the definition of CPO that are delineated in § 4.5.[20]

As stated previously in this release, and in the Proposal, Congress enacted the Dodd-Frank Act in response to the financial crisis of 2007 and 2008.[21] That Act requires the reporting of certain information by investment advisers to private funds related to potential systemic risk including, but not limited to, the amount of assets under management, use of leverage, counterparty credit risk exposure, and trading and investment positions for each private fund under the reporting entity's advisement.[22] This information facilitates oversight of the investment activities of funds within the context of the rest of a discrete market or the economy as a whole.

The sources of risk delineated in the Dodd-Frank Act with respect to private funds are also presented by commodity pools. To provide the Commission with similar information to address these risks, the Commission has determined to require registration of certain previously exempt CPOs and to further require reporting of information comparable to that required in Form PF, which the Commission has previously adopted jointly with the SEC. To implement this enhanced

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[18] 7 U.S.C. 12a(5).
[19] See H.R. Rep. No. 93-975, 93d Cong., 2d Sess. (1974), p. 20.
[20] See 68 FR 47231 (Aug. 8, 2003).
[21] See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).
[22] See section 404 of the Dodd-Frank Act.

oversight, the Commission proposed, and has now determined to adopt, the revision and rescission of certain discretionary exemptions that it previously granted.

B. The Proposal

Following the recent economic turmoil, and consistent with the tenor of the provisions of the Dodd-Frank Act, the Commission reconsidered the level of regulation that it believes is appropriate with respect to entities participating in the commodity futures and derivatives markets. Therefore, on January 26, 2011, the Commission proposed amendments and additions to its existing regulatory regime for CPOs and CTAs and the creation of two new data collection instruments, Forms CPO-PQR and CTA-PR ("Proposal").[23] In a concurrent joint proposal with the SEC, the Commission also proposed § 4.27(d) and sections 1 and 2 of Form PF.[24]

In the Proposal, the Commission specifically proposed the following amendments: (A) to require the periodic reporting of data by CPOs and CTAs regarding their direction of commodity pool assets; (B) to identify certain proposed filings with the Commission as being afforded confidential treatment; (C) to revise the requirements for determining which persons should be required to register as a CPO under § 4.5; (D) to require the filing of certified annual reports by all registered CPOs; (E) to rescind the exemptions from registration under §§ 4.13(a)(3) and (a)(4); (F) to require annual affirmation of claimed exemptive relief for both CPOs and CTAs; (G) to require an additional risk disclosure statement from CPOs and CTAs that engage in swaps

[23] See 76 FR 7976 (Feb. 11, 2011).
[24] See 76 FR 8068 (Feb. 11, 2011). Because the Commission did not adopt the remainder of proposed § 4.27 at the same time as it adopted the subsection of § 4.27 implementing Form PF, the Commission modified the designation of § 4.27(d) to be the sole text of that section. Additionally, the Commission made some revisions to the text of § 4.27 to: (1) clarify that the filing of Form PF with the SEC will be considered substitute compliance with certain Commission reporting obligations and (2) allow CPOs and CTAs who are otherwise required to file Form PF the option of submitting on Form PF data regarding commodity pools that are not private funds as substitute compliance with certain CFTC reporting obligations.

transactions; and (H) to make certain conforming amendments to the Commission's regulations in light of the proposed amendments.

In describing the rationale for the Proposal, the Commission stated:

> [T]o ensure that necessary data is collected from CPOs and CTAs that are not operators or advisors of private funds, the Commission is proposing a new § 4.27, which would require quarterly reports from all CPOs and CTAs to be electronically filed with NFA. The Commission is promulgating proposed § 4.27 pursuant to the Commission's authority to require the filing of reports by registered CPOs and CTAs under section 4n of the CEA. In an effort to eliminate duplicative filings, proposed § 4.27(d) would allow certain CPOs and/or CTAs that are also registered as private fund advisers with the SEC pursuant to the securities laws to satisfy certain of the Commission's systemic reporting requirements by completing and filing the appropriate sections of Form PF with the SEC with respect to advised private funds.
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> In order to ensure that the Commission can adequately oversee the commodities and derivatives markets and assess market risk associated with pooled investment vehicles under its jurisdiction, the Commission is re-evaluating its regulation of CPOs and CTAs. Additionally, the Commission does not want its registration and reporting regime for pooled investment vehicles and their operators and/or advisors to be incongruent with the registration and reporting regimes of other regulators, such as that of the SEC for investment advisers under the Dodd-Frank Act. (Footnotes omitted).[25]

C. Comments on the Proposal

The Commission received 61 comment letters in response to the Proposal. The commenters represented a diversity of market participants. Seven commenters were registered investment companies or registered investment advisers; five commenters were registered or exempt CPOs; and three commenters were registered investment companies or registered investment advisers that also claimed exemption from registration as a CPO under § 4.13. The Commission also received 20 comments from law firms; 14 comments from trade organizations; two comments from individual

[25] 76 FR 7976, 7977-78 (Feb. 11, 2011).

interested parties; a comment from a compliance service provider; and a comment from a registered futures association.[26] The majority of the comments received opposed the adoption of the proposed amendments to § 4.5 and the rescission of §§ 4.13(a)(3) and (a)(4).

Having considered these comments, the Commission has decided to adopt most of the amendments to part 4 that it proposed, with some modifications. In addition, the Commission has decided not to rescind the exemption in § 4.13(a)(3) for entities engaged in a de minimis amount of derivatives trading. The Commission's amendments to part 4, and the modifications to its Proposal are discussed below.

The scope of this Federal Register release generally is restricted to the comments received in response to the Proposal and to the changes to, and the clarifications of, the Proposal that the Commission is making in response thereto. The Commission encourages interested persons to read the Proposal for a fuller discussion of the purpose of each of the amendments contained in the Proposal.

D. Significant Changes From the Proposal

The significant changes from the Proposal that the Commission is making in the rules it is adopting today are as follows: (1) the marketing restriction in § 4.5 no longer contains the clause "(or otherwise seeking investment exposure to)"; (2) § 4.5 will be amended to include an alternative trading threshold test based on the net notional value of a registered investment company's derivatives positions; (3) annual notices for exemptions and exclusions will be filed on an annual calendar year end basis rather than on the anniversary of the filing date; and (4) changes

[26] Additionally, the Commission received six comments that were not pertinent to the substance of the Proposal. Three concerned position limits in silver, one consisted of a web address; one was an advertisement; and one simply said "nice."

have been made to the substance of Forms CPO-PQR and CTA-PR and the filing timelines for both forms.

II. Responses to Comments on the Proposal

A. Comments Regarding Proposed Amendments to § 4.5

As part of the Proposal, the Commission proposed amendments to § 4.5(c)(2)(iii), reinstating a trading threshold and marketing restriction for registered investment companies claiming exclusion from the definition of CPO under that section. In support of the Proposal, the Commission stated that it became aware that certain registered investment companies were offering interests in de facto commodity pools while claiming exclusion under § 4.5.[27] The Commission further stated that it believed that registered investment companies should not engage in such activities without Commission oversight and that such oversight was necessary to ensure consistent treatment of CPOs regardless of their status with respect to other regulators.[28] The Commission also recognized that operational issues may exist regarding the ability of registered investment companies to comply with the Commission's compliance regime.[29]

The Commission received numerous comments regarding the proposed amendments to § 4.5. The comments can be broadly categorized into eight categories: (1) general comments as to the advisability of making such a change and the Commission's justification for doing so; (2) the trading threshold; (3) the inclusion of swaps within the trading threshold; (4) the proposed marketing restriction; (5) harmonization of compliance obligations with those of the SEC; (6) the

[27] 76 FR 7976, 7983 (Feb. 12, 2011). The Commission determined to propose amendments to § 4.5 following the submission of a petition for rulemaking by the National Futures Association, to which the Commission has delegated much of its direct oversight activities relating to CPOs, CTAs, and commodity pools. See, 75 FR 56997 (Sept. 17, 2010).
[28] Id. at 7984.
[29] Id.

appropriate entity to register as the registered investment company's CPO; (7) the use and permissibility of controlled foreign corporations by registered investment companies; and (8) the timeline for implementation.

1. General Comments on Proposed Amendments to § 4.5

Certain comments argued against the adoption of any change to § 4.5 and questioned the Commission's justification for doing so.[30] Most commenters generally opposed the change because they claimed that requiring registration and compliance with the Commission's regulatory regime would provide no tangible benefit to the Commission or investors because registered investment companies are already subject to comprehensive regulation by the SEC.

The Commission believes that registration with the Commission provides two significant benefits. First, registration allows the Commission to ensure that all entities operating collective investment vehicles participating in the derivatives markets meet minimum standards of fitness and competency.[31] Second, registration provides the Commission and members of the public with a clear means of addressing wrongful conduct by individuals and entities participating in the derivatives markets. The Commission has clear authority to take punitive and/or remedial action against registered entities for violations of the CEA or of the Commission's regulations. Moreover, the Commission has the ability to deny or revoke registration, thereby expelling an individual or entity from serving as an intermediary in the industry. Members of the public also may access the Commission's reparations program or National Futures Association's ("NFA") arbitration program to seek redress for wrongful conduct by a Commission registrant and/or NFA

[30] Comment letter from the Investment Company Institute (April 12, 2011) ("ICI Letter"); comment letter from the Mutual Fund Directors Forum (April 12, 2011) ("MFDF Letter").
[31] See H.R. Rep. No. 565 (Part 1), 97th Cong., 2d Sess. 48 (1982), S. Rep. No. 384, 97th Cong., 2d Sess. 111 (1982). See also, 48 FR 14933 (Apr. 6, 1983).

member. Therefore, the Commission continues to believe that its registration requirements further critical regulatory objectives and serve important public policy goals.

A number of commenters who expressed general opposition also acknowledged that if the Commission determined to proceed with its proposed changes to § 4.5, certain areas of harmonization with SEC requirements should be addressed. To that end, concurrently with the issuance of this rule, the Commission plans to issue a notice of proposed rulemaking detailing its proposed modifications to part 4 of its regulations to harmonize the compliance obligations that apply to dually registered investment companies. Commenters did not question, however, that the Commission has a regulatory interest in overseeing entities engaging in derivatives trading. Rather, they argued that the SEC currently provides adequate oversight of their activities.

The Commission disagrees with the arguments presented by those commenters who argued against the adoption of any change to § 4.5. The Commission continues to believe that entities operating collective investment vehicles that engage in more than a de minimis amount of derivatives trading should be required to register with the Commission. The Commission believes that because Congress empowered the Commission to oversee the derivatives market, the Commission is in the best position to oversee entities engaged in more than a limited amount of non-hedging derivatives trading.

Several commenters also asserted that modifying § 4.5 would result in a significant burden to entities required to register with the Commission without any meaningful benefit to the Commission.[32] The Commission believes, as discussed throughout this release, that entities that

[32] See ICI Letter; comment letter from Vanguard (April 12, 2011) ("Vanguard Letter"); comment letter from Reed Smith LLP (April 12, 2011) ("Reed Smith Letter"); comment letter from AllianceBernstein Mutual Funds (April 12, 2011) ("AllianceBernstein Letter");comment letter from United States Automobile Association (April 12, 2011) ("USAA Letter"); comment letter from Principal Management Corporation (April 12, 2011) ("PMC Letter");

are offering services substantially identical to those of a registered CPO should be subject to substantially identical regulatory obligations. The Commission also recognizes that modification to § 4.5 may result in costs for registered investment companies. For that reason, as stated above, in conjunction with finalizing the proposed amendments to § 4.5, the Commission has proposed to adopt a harmonized compliance regime for registered investment companies whose activities require oversight by the Commission. Although the Commission believes the modifications to § 4.5 enhance the Commission's ability to effectively oversee derivatives markets, it is not the Commission's intention to burden registered investment companies beyond what is required to provide the Commission with adequate information it finds necessary to effectively oversee the registered investment company's derivatives trading activities. Through this harmonization, the Commission intends to minimize the burden of the amendments to § 4.5.

Second, the Commission disagrees with the commenters' assertion that the Commission would not receive any meaningful benefit from a modification to § 4.5. As stated above, the Commission disagrees that such registration and oversight is redundant, and emphasizes that it is in the best position to adequately oversee the derivatives trading activities of entities in which the Commission has a regulatory interest. As discussed above, the Commission is charged with administering the Commodity Exchange Act to protect market users and the public from fraud, manipulation, abusive practices and systemic risk related to derivatives that are subject to the Act, and to foster open, competitive, and financially sound markets. The Commission's programs are structured and its resources deployed in service of that mission.

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comment letter from Investment Adviser Association (April 12, 2011) ("IAA Letter"); comment letter from Dechert LLP and clients (April 12, 2011) ("Dechert II Letter"); comment letter from Janus Capital Management LLC (April 12, 2011) ("Janus Letter"); comment letter from Security Traders Association (April 12, 2011) ("STA Letter"); comment letter from Invesco Advisers, Inc. (April 12, 2011) ("Invesco Letter"); and comment letter from Equinox Fund Management, LLC (July 28, 2011) ("Equinox Letter").

One commenter questioned the Commission's reasoning for choosing to impose additional requirements on registered investment companies but not proposing to impose such requirements on other categories of entities.[33] This commenter also stated that the Commission was required to detail its reasoning under the Administrative Procedure Act.[34] As stated in the Proposal, the Commission remains concerned that registered investment companies are offering managed futures strategies, either in whole or in part, without Commission oversight and without making the disclosures to both the Commission and investors regarding the pertinent facts associated with the investment in the registered investment company. The Commission is focused on registered investment companies because it is aware of increased trading activity in the derivatives area by such entities that may not be appropriately addressed in the existing regulatory protections, including risk management and recordkeeping and reporting requirements. The SEC has also noted this increased trading activity and is reviewing the use of derivatives by investment companies.[35] In its recent concept release regarding the use of derivatives by registered investment companies, the SEC noted that although its staff had addressed issues related to derivatives on a case-by-case basis, it had not developed a "comprehensive and systematic approach to derivatives related issues."[36] As aptly noted by the Chairman of the SEC, "The controls in place to address

[33] See ICI Letter.
[34] Id.
[35] For example, the SEC recently issued a concept release seeking comment on use of derivatives by investment companies, noting: "The dramatic growth in the volume and complexity of derivatives investments over the past two decades, and funds' increased use of derivatives, have led the [Securities and Exchange] Commission and its staff to initiate a review of funds' use of derivatives under the Investment Company Act. (footnotes omitted)" 76 FR 55237, 55238 (Sep. 7, 2011).
[36] 76 FR 55237, 55239 (Sept. 7, 2011). See, Press Release, Securities and Exchange Commission, SEC Seeks Public Comment on Use of Derivatives by Mutual Funds and Other Investment Companies (Aug. 31, 2011), available at http://www.sec.gov/news/press/2011/2011-175.htm ("'The derivatives markets have undergone significant changes in recent years, and the Commission is taking this opportunity to seek public comment and ensure that our regulatory approach and interpretations under the Investment Company Act remain current, relevant, and consistent with investor protection,'" said SEC Chairman Mary Shapiro.").

fund management in traditional securities can lose their effectiveness when applied to derivatives. This is particularly the case because a relatively small investment in a derivative instrument can expose a fund to potentially substantial gain or loss – or outsized exposure to an individual counterparty."[37] Despite the commenter's assertion, the Commission is unaware of other classes of entities that are excluded from the definition of CPO engaging in significant derivatives trading. Of course, if the Commission becomes aware of any other categories of excluded entities engaging in similar levels of derivatives trading, it will consider appropriate action to ensure that such entities and their derivatives trading activities are brought under the Commission's regulatory oversight. As stated previously, the Commission continues to believe that entities that are offering services substantially identical to those of a registered CPO should be subject to substantially identical regulatory obligations.

2. Comments on the Proposed Trading Threshold

The Commission also received numerous comments on the proposed addition of a trading threshold to the exclusion under § 4.5.[38] The proposed trading threshold provided that derivatives trading could not exceed five percent of the liquidation value of an entity's portfolio, without

[37] Chairman Mary Shapiro, Opening Statement at SEC Open Meeting Item 1 – Use of Derivatives by Funds (Aug. 31, 2011), available at http://www.sec.gov/news/speech/2011/spch083111mls-item1.htm ("The current derivatives review gives us the opportunity to re-think our approach to regulating funds' use of derivatives. We are engaging in this review with a holistic perspective, in the wake of the financial crisis, and in light of the new comprehensive regulatory regime for swaps being developed under the Dodd-Frank Act.").

[38] See Invesco Letter; ICI Letter; Vanguard Letter; Reed Smith Letter; AllianceBernstein Letter; AII Letter; STA Letter; Janus Letter; PMC Letter; USAA Letter; comment letter from Fidelity Management and Research Co. (April 12, 2011) ("Fidelity Letter"); comment letter from Securities Industry and Financial Markets Association (April 12, 2011) ("SIFMA Letter"); comment letter from Dechert LLP (July 26, 2011) ("Dechert III Letter"); comment letter from Rydex/SGI Morgan, Lewis & Bockius LLP (April 12, 2011) ("Rydex Letter"); comment letter from the United States Chamber of Commerce (April 12, 2011) ("USCC Letter"); comment letter from Sidley Austin LLP (April 12, 2011) ("Sidley Letter"); comment letter from the National Futures Association (April 12, 2011) ("NFA Letter"); comment letter from Campbell & Company, Inc. (April 12, 2011) ("Campbell Letter"); comment letter from AQR Capital Management, LLC (April 12, 2011) ("AQR Letter"); comment letter from Steben & Company, Inc. (April 12, 2011) ("Steben Letter"); comment letter from the Investment Company Institute (July 28, 2011) ("ICI II Letter"); and comment from the Association of Institutional Investors (April 12, 2011) ("AII Letter").

registration with the Commission. The Proposal excluded activity conducted for "bona fide hedging" purposes.[39] Most commenters stated that a five percent threshold was far too low in light of the Commission's determination to include swaps within the measured activities and the limited scope of the Commission's bona fide hedging definition, but no data was provided to support this assertion. The Commission, in its adoption of the exemption under § 4.13(a)(3),[40] previously determined that five percent is an appropriate threshold to determine whether an entity warrants oversight by the Commission.[41]

Despite the views of some commenters, the Commission believes that the five percent threshold continues to be the appropriate percentage for exemption or exclusion based upon an entity's limited derivatives trading. Five percent remains the average required for futures margins, although the Commission acknowledges that margin levels for securities product futures are significantly higher and the levels for swaps margining may be as well. The Commission believes, however, that trading exceeding five percent of the liquidation value of a portfolio evidences a significant exposure to the derivatives markets. The Commission believes that such exposure should subject an entity to the Commission's oversight. Moreover, the Commission believes that its adoption of an alternative net notional test to determine eligibility for exclusion from the definition of CPO, as discussed infra, provides flexibility to registered investment companies in consideration of the fact that initial margin for certain commodity interest products may not permit compliance with the five percent threshold.

Commenters also recommended that the Commission exclude from the threshold calculation various instruments including broad-based stock index futures, security futures

[39] 76 FR 7976, 7989 (Feb. 11, 2011).
[40] 17 CFR 4.13(a)(3).
[41] 68 FR 47221, 47225 (Aug. 8, 2003).

generally, or financial futures contracts as a whole.[42] The Commission does not believe that exempting any of these instruments from the threshold calculation is appropriate. The Commission does not believe that there is a meaningful distinction between those security or financial futures and other categories of futures. The Commission believes that its oversight of the use of security or financial futures is just as essential as its oversight of physical commodity futures. Congress granted the Commission authority over all futures in § 2 of the CEA.[43] The Commission believes that it is in the best position to assess investor and market risks posed by entities trading in derivatives regardless of type. Therefore, the Commission has decided not to modify the scope of the threshold from what was proposed in order to exclude security futures or financial futures from the trading threshold.

Commenters requested that the Commission expand its definition of bona fide hedging as it appears in § 1.3(z) to include risk management as a recognized bona fide hedging activity for purposes of § 4.5.[44] The Proposal excluded activity conducted for "bona fide hedging" purposes as that term was defined in § 1.3 as it existed at the time of the proposal.[45] Further, the Proposal noted that the Commission anticipated that the definition of "bona fide hedging" would be modified through future rulemakings,[46] which were open for comments from the public.

The Commission recently adopted final rules regarding position limits and, through that rulemaking, implemented a new statutory definition of bona fide hedging transactions for exempt

[42] See Rydex Letter; Invesco Letter; ICI Letter.
[43] 7 U.S.C. 2.
[44] See Invesco Letter; ICI Letter; Vanguard Letter; Reed Smith Letter; AllianceBernstein Letter; IAA Letter; Janus Letter; and STA Letter.
[45] 76 FR 7976, 7989 (Feb. 11, 2011).
[46] 76 FR 7976, 7984 (Feb. 11, 2011).

and excluded commodity transactions as part of new § 151.5.[47] This statutory definition limits the scope of bona fide hedging transactions for exempt and agricultural commodities, and does not provide for a risk management exemption for position limits purposes.[48] With regard to position limits and bona fide hedging transactions for excluded commodities, the Commission amended the pre-Dodd-Frank definition of bona fide hedging in § 1.3(z) to only apply to excluded commodities. Further, the Commission allowed DCMs and SEFs that are trading facilities to provide for a risk management exemption from position limits for excluded commodity transactions.

The Commission does not believe that it is appropriate to exclude risk management transactions from the trading threshold. The Commission believes that an important distinction between bona fide hedging transactions and those undertaken for risk management purposes is that bona fide hedging transactions are unlikely to present the same level of market risk as they are offset by exposure in the physical markets. Additionally, the Commission is concerned that in the context of exclusion under § 4.5, a risk management exclusion would permit registered investment companies to engage in a greater volume of derivatives trading than other entities which are engaged in similar activities, but which are otherwise required to register as CPOs. This could result in disparate treatment among similarly situated entities. Moreover, there was no consensus among the commenters as to the appropriate definition of risk management transactions. Thus, the Commission believes that it may be difficult in this context to properly limit the scope of such exclusion as objective criteria are not universally recognized, which would make such exclusion onerous to enforce.[49]

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[47] 7 U.S.C. 6a(c); 76 FR 71626, 71643 (Nov. 18, 2011).
[48] 76 FR 71626, 71644 (Nov. 18, 2011)..
[49] The Commission notes that § 4.5 references the definition of bona fide hedging for exempt and agricultural commodities under § 151.5 as well as the definition of bona fide hedging for excluded commodities under § 1.3(z).

During numerous meetings with commenters, the commenters noted that most registered investment companies use derivatives for risk management purposes, namely to offset the risk inherent in positions taken in the securities or bond markets, or to equitize cash efficiently. Although the Commission recognizes the importance of the use of derivatives for risk management purposes, it does not believe that transactions that are not within the bona fide hedging definition should be excluded from the determination of whether an entity meets the trading threshold for registration and oversight. Therefore, the Commission has decided not to exclude risk management activities by registered investment companies from the trading threshold for purposes of § 4.5.

Several panelists at the Commission's staff roundtable held on July 6, 2011[50] ("Roundtable") suggested that, instead of a trading threshold that is based on a percentage of margin, the Commission should focus solely on entities that offer "actively managed futures" strategies.[51] The panelist defined "actively managed futures" strategies as those in which the entity or its investment adviser made its own decisions as to which derivatives to take positions in, as compared to the "passive" use of an index, wherein the entity's investments simply track those held by an index.[52]

The Commission does not believe that it is proper to exclude from the Commission's oversight those entities that are using an index or other so-called "passive" means to track the

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Market participants should not construe either § 151.5 or § 1.3(z) as permitting a risk management exemption for purposes of determining compliance with the trading threshold in § 4.5.

[50] See Notice of CFTC Staff Roundtable Discussion on Proposed Changes to Registration and Compliance Regime for Commodity Pool Operators and Commodity Trading Advisors, available at http://www.cftc.gov/PressRoom/Events/opaevent_cftcstaff070611.

[51] See Transcript of CFTC Staff Roundtable Discussion on Proposed Changes to Registration and Compliance Regime for Commodity Pool Operators and Commodity Trading Advisors ("Roundtable Transcript"), at 19, 25, 30, 76-77, 87-90, available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission27_070611-trans.pdf.

[52] Id.

value of other derivatives. Establishing "active" versus "passive" use of derivatives as a criterion for entitlement to the exclusion would introduce an element of subjectivity to an otherwise objective standard and make the threshold more difficult to interpret, apply, and enforce. It also could have the undesirable effect of encouraging funds to structure their investment activities to avoid regulation. Moreover, the use of an index or other passive investment vehicle by a large number of investment companies can amplify the market assumptions built into an index or other vehicle. Thus, the Commission has decided not to adopt the panelist's suggestion that the Commission focus on whether an entity offers an actively managed futures strategy.

One commenter suggested that the Commission should consider the adoption of an alternative test that would be identical to the aggregate net notional value test that is currently available under § 4.13(a)(3)(ii)(B).[53] Section 4.13(a)(3)(ii)(B) provides that an entity can claim exemption from registration if the net notional value of its fund's derivatives trading does not exceed one hundred percent of the liquidation value of the fund's portfolio.[54]

Conversely, several panelists at the Roundtable opposed such a test, stating that it was not a reliable means to measure an entity's exposure in the market.[55] Specifically, certain panelists asserted that the net notional value of positions may not provide a reliable measure of the risk posed by certain entities in the market.[56]

The Commission first considered the addition of an alternative net notional trading threshold when it proposed to amend § 4.5 in 2002.[57] In support of its proposal, the Commission stated that the alternative test provided otherwise regulated entities that use certain classes of

[53] Dechert III Letter.
[54] 17 CFR 4.13(a)(3)(ii)(B).
[55] See Roundtable Transcript at 69-71.
[56] See Roundtable Transcript at 70.
[57] 67 FR 65743 (Oct. 28, 2002).

futures with higher initial margin requirements with an opportunity to also receive exclusionary relief from the definition of CPO.[58] The Commission further stated that the inclusion of an alternative test enabled entities seeking exclusion to rely on whichever test was less restrictive based on their futures positions.[59] In 2003, the Commission proposed and adopted final rules amending § 4.5, which eliminated the five percent trading threshold and did not adopt the alternative net notional test.[60] In stating its rationale for rescinding the five percent threshold test and declining to adopt the alternative net notional test, the Commission stated that because it was simultaneously proposing, and ultimately adopting, an exemption from registration in § 4.13(a)(4), which did not impose any trading restriction, the Commission would remove the trading restrictions from § 4.5 as well to provide consistent treatment.[61]

The Commission no longer believes that its prior justification for abandoning the alternative net notional test is persuasive. By the adoption of this final rule, the Commission will reinstate the five percent trading threshold in § 4.5 for registered investment companies and rescind the exemption in § 4.13(a)(4), which reverses the regulatory conditions in existence in 2003. The Commission believes that the appropriate criteria for exclusion through the use of a net notional test is delineated in § 4.13(a)(3)(ii)(B),[62] commonly known as the "de minimis exemption," albeit with the addition of allowing unlimited use of futures, options, or swaps for bona fide hedging purposes, which is not permitted under § 4.13(a)(3).

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[58] 67 FR 65743, 65744-45.
[59] 67 FR 65743, 65745.
[60] 68 FR 12622 (Mar. 17, 2003); 68 FR 47221 (Aug. 8, 2003).
[61] 68 FR 12622, 12625-26 (noting that although entities excluded under § 4.5 could solicit retail participants, as compared to those entities exempt under § 4.13(a)(4), which may only offer to certain high net worth entities and individuals, the Commission stated that the fact that the § 4.5 entities were otherwise regulated supported consistent criteria for relief).
[62] The net notional test as it appears in § 4.13(a)(3) will be amended by this rulemaking to provide guidance regarding the ability to net cleared swaps.

As stated previously, the net notional test, as set forth under § 4.13(a)(3)(ii)(B), permits entities to claim relief if the aggregate net notional value of the entity's commodity interest positions does not exceed 100 percent of the liquidation value of the pool's portfolio.[63] Notional value is defined by asset class. For example, the notional value of futures contracts is derived by multiplying the number of contracts by the size of the contract, in contract units, and then multiplying by the current market price for the contract.[64] The notional value of a cleared swap, however, will be determined consistent with the provisions of part 45 of the Commission's regulations. The ability to net positions is also determined by asset class, with entities being able to net futures contracts across designated contract markets or foreign boards of trade, whereas swaps may only be netted if cleared by the same designated clearing organization ("DCO") and it is otherwise appropriate.[65]

The Commission believes that the adoption of an alternative net notional test will provide consistent standards for relief from registration as a CPO for entities whose portfolios only contain a limited amount of derivatives positions and will afford registered investment companies with additional flexibility in determining eligibility for exclusion. Therefore, the Commission will adopt an alternative net notional test, consistent with that set forth in § 4.13(a)(3)(ii)(B) as amended herein, for registered investment companies claiming exclusion from the definition of CPO under §4.5..

The Commission also received several comments supporting both the imposition of a trading threshold in general and the five percent threshold specifically.[66] At least one commenter

[63] 17 CFR 4.13(a)(3)(ii)(B).
[64] Id.
[65] See discussion of amendments to § 4.13(a)(3)(ii)(B) infra.
[66] See NFA Letter, Campbell Letter, AQR Letter, Steben Letter.

suggested, however, that the Commission consider requiring registered investment companies that exceed the threshold to register, but not subjecting them to the Commission's compliance regime beyond requiring them to be subject to the examination of their books and records, and examination by the National Futures Association.[67] In effect, this commenter requested that the Commission subject such registrant to "notice registration." The Commission believes that adopting the commenter's approach would not materially change the information that the Commission would receive regarding the activities of registered investment companies in the derivatives markets, which is one of the Commission's purposes in amending § 4.5. Moreover, a type of notice registration would not provide the Commission with any real means for engaging in consistent ongoing oversight. Notwithstanding such notice registration, the Commission would still be deemed to have regulatory responsibility for the activities of these registrants. In the Commission's view, notice registration does not equate to an appropriate level of oversight. For that reason, the Commission has determined not to adopt the notice registration system proposed by the commenter. The Commission is adopting the amendment to § 4.5 regarding the trading threshold with the addition of an alternative net notional test for the reasons stated herein and those previously discussed in the Proposal.

3. Comments on the Inclusion of Swaps in the Trading Threshold

The Commission also received numerous comments opposing its decision to include swaps within the threshold test discussed above.[68] Several commenters expressed concern that the Commission would require inclusion of swaps within the threshold prior to its adoption of final rules further defining the term "swap" and explaining the margining requirements for such

[67] See AQR Letter.
[68] See Janus Letter; Reed Smith Letter; AllianceBernstein Letter; USAA Letter; ICI Letter; PMC Letter; Invesco Letter; IAA Letter; Dechert II Letter; AII Letter; and SIFMA Letter.

instruments. The Commission agrees that it should not implement the inclusion of swaps within the threshold test prior to the effective date of such final rules. Therefore, it is the Commission's intention to establish the compliance date of the inclusion of swaps within the threshold calculation as 60 days after the final rules regarding the definition of "swap" and the delineation of the margin requirement for such instruments are effective.[69] The Commission believes that such compliance date will provide entities with sufficient time to assess the impact of such rules on their portfolios and to make the determination as to whether registration with the Commission is required.

The Commission also received a comment asking for additional clarification regarding its decision to include swaps within the threshold.[70] The Dodd-Frank Act amended the statutory definition of the terms "commodity pool operator" and "commodity pool" to include those entities that trade swaps.[71] If the Commission were to adopt the trading threshold and only include futures and options as the basis for calculating compliance with the threshold, the swaps activities of the registered investment companies would still trigger the registration requirement notwithstanding the exclusion of swaps from the calculus. That is, the purpose of the threshold test is to define a de minimis amount of trading activity that would not trigger the registration requirement. If swaps were excluded, any swaps activities undertaken by a registered investment company would result in that entity being required to register because there would be no de minimis exclusion. As a result, one swap contract would be enough to trigger the registration requirement. For that reason, if the Commission wants to permit some de minimis level of swaps activity by registered investment companies without registration with the Commission, it must do so explicitly in the

[69] Effective Date for Swap Regulation, 76 FR 42508 (issued and made effective by the Commission on July 14, 2011; published in Federal Register on July 19, 2011).
[70] See Janus Letter; Reed Smith Letter; AllianceBernstein Letter; USAA Letter; ICI Letter; PMC Letter; Invesco Letter; IAA Letter; Dechert II Letter; AII Letter; and SIFMA Letter.
[71] 7 U.S.C. 1a(10); 1a(11).

exclusion.[72] Because the Commission has determined that de minimis activity by registered investment companies does not implicate the Commission's regulatory concerns, the Commission has decided to include swaps as a component of the trading threshold.

4. Comments on the Proposed Marketing Restriction

The marketing restriction, as proposed by the Commission, prohibits the marketing of interests in the registered investment company "as a vehicle for trading in (or otherwise seeking investment exposure to) the commodity futures, commodity options, or swaps markets."[73] Again, as with the other aspects of the proposed amendments to § 4.5, the Commission received numerous comments on this prohibition.[74]

The vast majority of comments urged the Commission to remove the clause "or otherwise seeking investment exposure to" as introducing an unacceptable level of ambiguity into the marketing restriction.[75] The Commission agrees with these comments and believes that the removal of this clause is appropriate as the clause does not meaningfully add to the marketing restriction and only creates uncertainty. Thus, the Commission will adopt the marketing restriction without the clause "or otherwise seeking investment exposure to . . . ."

The Commission also received many comments asking that the Commission provide some clarification regarding the factors that it would consider in making the determination whether an

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[72] Any reference to a de minimis level of swaps activities by registered investment companies only applies in the context of CPO registration by registered investment companies.
[73] 76 FR 7976, 7989 (Feb. 12, 2011).
[74] See Rydex Letter; Fidelity Letter; SIFMA Letter; AII Letter; ICI Letter; Vanguard Letter; Reed Smith Letter; AllianceBernstein Letter; USAA Letter; PMC Letter; Invesco Letter; Janus Letter; STA Letter; comment letter from the Managed Futures Association regarding proposed amendments to § 4.5 (April 12, 2011) ("MFA II Letter"); Dechert II Letter; NFA Letter; comment letter from Alston & Bird, LLP (April 12, 2011) ("Alston Letter"); Campbell Letter; AQR Letter; Steben Letter; and Dechert III Letter.
[75] See, e.g., ICI Letter; Alston Letter; Rydex Letter; and Vanguard Letter.

entity violated the marketing restriction.[76] The Commission agrees that providing factors to further explain the plain language of the marketing restriction would be helpful to those who plan to market registered investment companies to investors. The Commission has determined, however, that such factors should be instructive and that no single factor is dispositive. The Commission will determine whether a violation of the marketing restriction exists on a case by case basis through an examination of the relevant facts. The Commission seeks to discourage entities from designing creative marketing with the intent to avoid the marketing restriction.

To address commenters' requests for guidance, the Commission believes that the following factors are indicative of marketing a registered investment company as a vehicle for investing in commodity futures, commodity options, or swaps:

- The name of the fund;
- Whether the fund's primary investment objective is tied to a commodity index;
- Whether the fund makes use of a controlled foreign corporation for its derivatives trading;
- Whether the fund's marketing materials, including its prospectus or disclosure document, refer to the benefits of the use of derivatives in a portfolio or make comparisons to a derivatives index;
- Whether, during the course of its normal trading activities, the fund or entity on its behalf has a net short speculative exposure to any commodity through a direct or indirect investment in other derivatives;
- Whether the futures/options/swaps transactions engaged in by the fund or on behalf of the fund will directly or indirectly be its primary source of potential gains and losses; and

[76] See ICI Letter; MFA II Letter; Dechert II Letter; Invesco Letter; NFA Letter; Campbell Letter; Steben Letter; and AQR Letter.

- Whether the fund is explicitly offering a managed futures strategy.[77]

The Commission will give more weight to the final factor in the list when determining whether a registered investment company is operating as a de facto commodity pool. In contrast, a registered investment company that does not explicitly offer a managed futures strategy could still be found to have violated the marketing restriction based on whether its conduct satisfied any number of the other factors enumerated above. Put differently, if a registered investment company offers a strategy with several indicia of a managed futures strategy, yet avoids explicitly describing the strategy as such in its offering materials, that registered investment company may still be found to have violated the marketing restriction.

The Commission also notes that whether the name of the fund includes the terms "futures" or "derivatives," or otherwise indicates a possible focus on futures or derivatives, will not be considered a dispositive factor, but rather one of many that the Commission will consider in making its determination. Moreover, the Commission will not consider the mere disclosure to investors or potential investors that the registered investment company may engage in derivatives trading incidental to its main investment strategy and the risks associated therewith as being violative of the marketing restriction.

At the Roundtable, several panelists questioned the Commission's reasoning for deeming the use of a controlled foreign corporation ("CFC") to be an appropriate factor in determining whether the registered investment company violates the marketing restriction. Based on comments received at the Roundtable and during the comment period, the Commission believes that registered investment companies use controlled foreign corporations as a mechanism to invest up

[77] These factors are derived in substantial part from the Steben Letter and AQR Letter.

to 25 percent of the registered investment company's portfolio in derivatives.[78] The Commission, therefore, believes that a registered investment company's use of a CFC may indicate that the company is engaging in derivatives trading in excess of the trading threshold. Again, the Commission will consider this factor in the context of the registered investment company's other conduct and will not view this factor as being dispositive of a violation of the marketing restriction.

For these reasons, and those stated in the Proposal, the Commission adopts the marketing restriction in § 4.5 with the modifications discussed herein.

5. Comments on the Harmonization of Compliance Obligations

Many commenters raised concerns about the potential conflicts between the Commission's regulatory regime and that imposed by the SEC if the Commission were to adopt the proposed amendments as final rules.[79] As noted above, in an effort to obtain further information from interested parties, Commission staff held the Roundtable, and invited staff from the SEC, the IRS, and members of various trade organizations. The roundtable focused predominantly on harmonization of the Commission's compliance regime with that of the SEC. Upon consideration of the comments and the discussions held as a result of the Roundtable relating to registered investment companies that will be required to register under amended § 4.5, the Commission agrees that it is necessary to harmonize the Commission's compliance obligations under part 4 of the Commission's regulations with the requirements of the SEC for registered investment companies. To that end, concurrently with the issuance of this rule, the Commission is issuing a

[78] See Roundtable Transcript at 152-53.
[79] See Vanguard Letter; ICI Letter; Dechert III Letter; Reed Smith Letter; AllianceBernstein Letter; USAA Letter; PMC Letter; Invesco Letter; IAA Letter; Dechert II Letter; Fidelity Letter; Janus Letter; SIFMA Letter; STA Letter; AQR Letter; NFA Letter; MFA II Letter; Alston Letter; Rydex Letter; and ICI II Letter.

notice of proposed rulemaking detailing its proposed modifications to part 4 of its regulations to harmonize the compliance obligations that apply to dually registered investment companies. The Commission will not require entities that must register due to the amendments to § 4.5 to comply with the Commission's compliance regime until the adoption of final rules governing the compliance framework for registered investment companies subject to the Commission's jurisdiction.

6. Comments Regarding the Entity Required to Register as the CPO

The Commission received a number of comments requesting clarification as to which entity would be required to register as a CPO if a registered investment company would not qualify for exclusion under § 4.5, as amended.[80] The commenters consistently proposed that the registered investment company's investment adviser is the appropriate entity to register in the capacity of the investment company's CPO. The Commission agrees that the investment adviser is the most logical entity to serve as the registered investment company's CPO. To require a member or members of the registered investment company's board of directors to register would raise operational concerns for the registered investment company as it would result in piercing the limitation on liability for actions undertaken in the capacity of director.[81] Thus, the Commission concludes that the investment adviser for the registered investment company is the entity required to register as the CPO.

7. Comments Regarding the Use of Controlled Foreign Corporations

[80] See ICI Letter; Reed Smith Letter; AllianceBernstein Letter; Rydex Letter; Fidelity Letter; USAA Letter; PMC Letter; IAA Letter; Janus Letter; SIFMA Letter; STA Letter; comment letter from AlphaSimplex Group (April 12, 2011) ("ASG Letter"); NFA Letter; MFDF Letter; and Campbell Letter.
[81] See MFDF Letter.

The Commission received many comments regarding the use of CFCs by registered investment companies for purposes of engaging in commodities trading. As stated previously, it is the Commission's understanding that registered investment companies invest up to 25 percent of their assets in the CFC, which then engages in actively managed derivatives strategies, either on its own or under the direction of one or more CTAs. Operators of CFCs have been exempt from Commission registration by claiming relief under § 4.13(a)(4) of the Commission's regulations because the sole participant in the CFC is the registered investment company. Additionally, at the Roundtable, panelists informed Commission staff that several registered investment companies that operated CFCs did not claim relief under § 4.13(a)(4) because it was their opinion that the CFC was merely a subdivision of the registered investment company and was not a separate commodity pool.[82]

Commenters urged the Commission to continue to permit registered investment companies to use CFCs and to allow such CFCs to be exempt from registration with the Commission under § 4.13 or exclude them under § 4.5 by reason of their sole investor being excluded as well. Commenters proposed various mechanisms by which the Commission could obtain information regarding the activities of CFCs, including requiring disclosure of CFC fees and expenses at the registered investment company level, requiring a representation that the CFC will comply with key provisions of the Investment Company Act of 1940 ("Investment Company Act"),[83] and requiring the registered investment company to make its CFC's books and records available to the Commission and NFA for inspection.

[82] See Roundtable Transcript at 165.
[83] 15 U.S.C. 80a-1, et seq.

The Commission does not oppose the continued use of CFCs by registered investment companies, but it believes that CFCs that fall within the statutory definition of "commodity pool" should be subject to regulation as a commodity pool.[84] The Dodd-Frank Act amended the CEA to define a commodity pool as "any investment trust, syndicate, or similar form of enterprise operated for the purpose of trading in commodity interests, including any . . . commodity for future delivery, security futures product, or swap."[85] Based on a plain language reading of the statutory definition, CFCs wholly owned by registered investment companies and used for trading commodity interests are properly considered commodity pools. These entities also satisfy the definition of "pool" delineated in § 4.10(d)(1) of the Commission's regulations, which is substantively identical to the statutory definition. There is no meaningful basis for concluding otherwise. Moreover, the Commission believes that each separate legally cognizable entity must be assessed on its own characteristics and that a CFC should not be entitled to exclusion simply because its parent company is a registered investment company that may be entitled to exclusion under § 4.5. Therefore, the Commission does not oppose the use of CFCs for trading in commodity interests by registered investment companies, but such CFCs will be required to have their CPOs register with the Commission unless they may claim exemption or exclusion therefrom on their own merits.

8. Comments Regarding Implementation of Amendments

The Commission received several comments with suggestions regarding implementation of the proposed amendments to § 4.5, if the Commission decided to adopt the proposed provisions as

[84] 7 U.S.C. 1a(10).
[85] 7 U.S.C. 1a(10).

final rules.[86] Several commenters recommended that the Commission provide for an undefined "substantial transition period for compliance."[87] Conversely, one commenter suggested that the Commission should only provide a short period of time for compliance.[88] Another commenter suggested that at least 12-months would be required for registered investment companies to come into registration and compliance with Commission requirements.[89] Finally, a commenter suggested that the Commission delay implementation until all mandatory Dodd-Frank Act rules are implemented.[90]

In light of the Commission's proposed harmonization effort with respect to the compliance obligations for dually registered investment companies and the ongoing efforts to further define the term "swap" and the margin requirements for swaps positions, the Commission recognizes that a short implementation period is not practicable. The Commission believes that 11 months is an adequate amount of time to enable compliance by existing registered investment companies. Recognizing that the definition of swap is not yet finalized, the Commission has decided that compliance with the amendments to § 4.5 for purposes of registration only will occur on the later of either December 31, 2012 or within 60-days following the adoption of final rules defining the term "swap," and establishing margin requirements for such instruments.[91] Entities required to register due to the amendments to § 4.5 shall be subject to the Commission's recordkeeping, reporting, and disclosure requirements set forth in part 4 of the Commission's regulations within

[86] See Steben Letter; ICI Letter; NFA Letter; Reed Smith Letter; AllianceBernstein Letter; USAA Letter; PMC Letter; IAA Letter; Janus Letter; STA Letter; Rydex Letter; Alston Letter; and comment letter from the Association of Institutional Investors (July 1, 2011) ("AII II Letter").
[87] See ICI Letter; NFA Letter; Reed Smith Letter; AllianceBernstein Letter; USAA Letter; PMC Letter; IAA Letter; Janus Letter; and STA Letter.
[88] See Steben Letter.
[89] See Rydex Letter.
[90] See AII II Letter.
[91] Effective Date for Swap Regulation, 76 FR 42508.

60 days following the effectiveness of a final rule implementing the Commission's proposed harmonization effort pursuant to the concurrent proposed rulemaking.

Several commenters also suggested that the Commission exempt from compliance those registered investment companies that have already claimed relief under § 4.5.[92] The Commission does not believe that "grandfathering" is appropriate in this context. As the Commission stated in its Proposal, and reaffirms in this preamble, part of the purpose of amending § 4.5 is to ensure that entities that are engaged in a certain level of derivatives trading are subject to the registration and compliance obligations and oversight by the Commission.[93] Grandfathering is inconsistent with the goals of the Commission's amendments. The Commission, however, believes that harmonization of the Commission's compliance regime with that of the SEC will minimize the regulatory burden of existing registered investment companies. In addition, the Commission is permitting a sufficient amount of time for existing entities to come into compliance before the compliance dates set forth above. Therefore, the Commission believes that it is addressing the commenters' concerns through harmonization while still ensuring that the Commission has the information necessary to oversee all participants in the derivatives markets.

B. Comments Regarding Proposed Amendment to § 4.7

The Commission proposed two amendments to § 4.7. The first proposed to amend §§ 4.7(a)(3)(ix) and (a)(3)(x) to incorporate by reference the accredited investor standard from the SEC's Regulation D[94] under the Securities Act of 1933,[95] rather than by direct inclusion of its specific terms. The Commission stated that this amendment would "permit the Commission's

[92] See ICI Letter; Reed Smith Letter; AllianceBernstein Letter; Invesco Letter; IAA Letter; Janus Letter; AII Letter; SIFMA Letter; and STA Letter.
[93] 76 FR 7976, 7983-84 (Feb. 12, 2011).
[94] 17 CFR 230.501(a)(5), (a)(6) (2011).
[95] 15 U.S.C. 77a, et seq.

definition of QEP to continue to include the specific terms of the accredited investor standard in the event that it is later modified by the SEC without requiring the Commission to amend § 4.7 each time to maintain parity."[96]

The Commission received one comment supporting this proposed amendment. Specifically, the commenter stated its belief that this amendment would "facilitate consistency amongst federal standards for financial sophistication and reduce investor confusion."[97] The Commission agrees and, accordingly, is adopting the amendments to §§ 4.7(a)(3)(ix) and (a)(3)(x) as proposed.

The second proposed amendment to § 4.7 would rescind the relief provided in § 4.7(b)(3)[98] from the certification requirement of § 4.22(c)[99] for financial statements contained in commodity pool annual reports. In support of the Proposal, the Commission noted that approximately 85 percent of all pools operated under § 4.7 in fiscal year 2009 filed financial statements that were certified by certified public accountants, "despite being eligible to claim relief from certification under § 4.7(b)(3)."[100] The number of uncertified financial statements has continued to decline and, for fiscal year 2010, approximately 91 percent of all reports filed for pools operated under § 4.7 included financial statements that were certified by certified public accountants.[101] In the Proposal, the Commission stated its belief that "requiring certification of financial information by an independent accountant in accordance with established accounting standards will ensure the

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[96] 76 FR 7976, 7985 (Feb. 12, 2011).
[97] See MFA II Letter.
[98] 17 CFR 4.7(b)(3) (2011).
[99] Id. 4.22(c).
[100] 76 FR 7967, 7984-85 (Feb. 12, 2011).
[101] In 2010, 951 pools were operated pursuant to § 4.7 and 84 of those pools filed uncertified financial statements for fiscal year 2010.

accuracy of the financial information submitted by its registrants," and will further the stated purposes of the Dodd-Frank Act.[102]

The Commission received two comments regarding this proposed amendment. One commenter supported the proposed rescission and the Commission's stated justification for doing so.[103] The other commenter recommended that the Commission retain an exemption from certification of financial statements for entities where the pool's participants are limited to the principals of its CPO(s) and CTA(s) and other categories of employees listed in § 4.7(a)(2)(viii).[104] It is unclear how many of the pools operated under § 4.7 would qualify for such relief if adopted. The Commission believes that rather than adopt an exemption for such entities without data regarding the scope of the exemption's applicability, it is more appropriate to rescind the exemption from certification for all pools operated under § 4.7(b)(3) generally and permit entities to write to the Division of Swap Dealer and Intermediary Oversight to request exemptive relief from the certification requirement on a case by case basis under § 140.99.[105] By requiring entities to request relief from the Commission, the Commission can better determine whether such an exemption should be adopted in the future. Therefore, the Commission is adopting the amendments to § 4.7 as proposed.

C. Comments Regarding the Proposed Rescission of §§ 4.13(a)(3) and (a)(4)

As stated previously, the Commission proposed to rescind §§ 4.13(a)(3) and (a)(4). After considering the comments received, which are detailed herein, the Commission has determined to retain the de minimis exemption in § 4.13(a)(3). The Commission concluded that overseeing

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[102] Id. at 7985.
[103] See NFA Letter.
[104] See MFA II Letter.
[105] 17 CFR § 140.99.

entities with less than five percent exposure to commodity interests is not the best use of the Commission's limited resources. Moreover, the Commission believes that the retention of the de minimis exemption in § 4.13(a)(3) provides for consistent treatment of entities engaging in de minimis levels of trading due to the addition of a five percent trading threshold in § 4.5 as well. The Commission received several comments requesting that the Commission modify § 4.13(a)(3) in various respects. The Commission has determined, however, that it is appropriate to retain § 4.13(a)(3) in its current form, for the reasons detailed below.

1. General Comments

In addition to the comments that the Commission received regarding the specific parts of the Proposal rescinding §§ 4.13(a)(3) and (a)(4), the Commission received numerous comments regarding the proposed rescissions generally.[106] Broadly, the comments opposed the rescission of both provisions.

Several commenters asserted that rescission was not necessary because the Commission has the means to obtain any needed information from exempt CPOs through its large trader reporting requirements and its special call authority.[107] Although the Commission has the means to obtain certain information through the mechanisms delineated by the commenters, neither of those mechanisms provide the type of data requested on Forms CPO-PQR or CTA-PR with the kind of regularity proposed under § 4.27. For example, large trader reporting may provide detailed

[106] See comment letter from the New York State Bar Association (April 12, 2011) ("NYSBA Letter"); comment letter from Skadden, Arps, Slate, Meagher & Flom LLP (April 12, 2011) ("Skadden Letter"); MFA Letter; comment letter from Katten, Muchin Rosenman LLP (April 12, 2011) ("Katten Letter"); Fidelity Letter; Dechert Letter; comment letter from the Alternative Investment Management Association, Ltd. (April 12, 2011) ("AIMA Letter"); comment letter from the Alternative Investment Management Association, Ltd. (July 1, 2011) ("AIMA II Letter"); IAA Letter; SIFMA Letter; comment letter from HedgeOp Compliance, LLC (July 28, 2011) ("HedgeOp Letter"); comment letter from the Private Investor Coalition; Inc. (April 12, 2011) ("PIC Letter"); and comment letter Seward & Kissel, LLP (April 12, 2011) ("Seward Letter").

[107] See Skadden Letter; Katten Letter; and MFA Letter.

trading information for a particular market participant, but it does not provide the Commission with information regarding trends across funds that are not large enough to trigger the reporting obligation, but that may nevertheless impact the market. Also, with respect to the Commission's special call authority under § 21.03, the collection of data under that section is generally reactive in nature. That is, the Commission would be in a position to collect data under § 21.03 after it became aware of an issue. Conversely, it is anticipated that collecting data using Forms CPO-PQR and CTA-PR will enable the Commission to be more proactive in assessing possible threats to market stability and in carrying out its duties in overseeing market participants generally.

Some commenters suggested that the Commission adopt a limited exemption for SEC-registered entities that are not "primarily engaged" in trading commodity interests.[108] Pursuant to the terms of § 4m(3) of the CEA, as amended by the Dodd-Frank Act, CTAs that are registered with the SEC and whose business does not consist primarily of acting as a CTA, and that do not act as a CTA to any pool engaged primarily in the trading of commodity interests, are exempt from registration with the Commission.[109] The Commission believes that that statutory exemption for CTAs is explicit as to Congress's limited intentions regarding exempting entities from registration with the Commission. By the plain language of § 4m(3), this section creates an exemption from the CTA registration requirements of the CEA; commodity pools are discussed in that provision only to the extent that the characteristics of the pool enable the CTA to claim relief. The registration category of CPO is not implicated. Therefore, the Commission concludes that the provisions of § 4m(3) do not mandate any exemption from the registration requirements for CPOs. Moreover, the Commission disagrees with the commenter who asserted that rescission is

[108] See Dechert Letter; and Katten Letter.
[109] 7 U.S.C. 6m(3).

inconsistent with Congress's asserted intention to avoid dual registration. The Commission does not believe it is accurate to state that Congress intended to avoid oversight by both agencies, and indeed Congress clearly anticipated some overlap when, in the Dodd-Frank Act, it required the Commission to work with the SEC to adopt a data collection instrument for dual registrants. Section 406 of the Dodd-Frank Act explicitly mandated that the Commission and the SEC jointly promulgate a reporting form for dually registered entities.[110] The Commission does not believe that this requirement could be consistent with any asserted Congressional intention to absolutely avoid dual registration with the commissions. Therefore, the Commission concludes that dual registration of certain entities is not irreconcilable with the Congressional intent underlying the Dodd-Frank Act.

Other commenters asserted that the compliance and regulatory obligations under the Commission's rules are burdensome and costly for private businesses and would unnecessarily distract entities from their primary focus of managing client assets.[111] The Commission disagrees with this assertion, which in any event was not fully detailed by any commenter. The Commission believes that regulation is necessary to ensure a well functioning market and to provide investor protection. The Commission further believes that the compliance regime that the Commission has adopted strikes the appropriate balance between limiting the burden placed on registrants and enabling the Commission to carry out its duties under the CEA. Moreover, the compliance and regulatory obligations imposed on these CPO registrants will be no different from those imposed on other registered CPOs. Such compliance and regulatory obligations have not been unduly burdensome for these other registrants.

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[110] See Section 406 of the Dodd-Frank Act.
[111] See MFA Letter; Seward Letter; and Katten Letter.

2. Comments Regarding the Proposed Rescission of § 4.13(a)(3)

In the Proposal, the Commission proposed rescinding the "de minimis" exemption in § 4.13(a)(3). The Commission stated its belief that "it is possible for a commodity pool to have a portfolio that is sizeable enough that even if just five percent of the pool's portfolio were committed to margin for futures, the pool's portfolio could be so significant that the commodity pool would constitute a major participant in the futures market."[112] Moreover, the Commission stated that it believed that this rescission was consistent with the purposes of the Dodd-Frank Act, with specific regard to increased transparency and accountability of participants in the financial markets. The Commission did, however, solicit comment as to whether some form of de minimis exemption should be maintained.

The Commission received ten comments specifically on its proposed rescission of the "de minimis" exemption in § 4.13(a)(3).[113] The commenters consistently urged the Commission to retain a de minimis exemption. Some commenters cited to the amendment to § 4m(3) of the CEA by the Dodd Frank Act, which provides an exemption from registration for CTAs that are registered with the SEC and whose business does not consist primarily of acting as a CTA and that does not act as a CTA to any pool engaged primarily in the trading of commodity interests.[114] One commenter stated that the effect of § 4m(3) was to exempt such CTAs from registration as a CPO or CTA;[115] whereas another commenter asserted that the amendment of § 4m(3) is evidence that Congress did not intend to have the operator of a commodity pool register as a CPO if its pool is

[112] 76 FR 7976, 7985 (Feb. 12, 2011).
[113] See MFA Letter; NYSBA Letter; comment letter from Schulte Roth & Zabel LLP (April 12, 2011) ("Schulte Letter"); Dechert III Letter; Skadden Letter; Seward Letter; IAA Letter; NFA Letter; SIFMA Letter; and comment letter from McGuireWoods LLC (April 12, 2011) ("McGuireWoods Letter").
[114] 7 U.S.C. 6m(3).
[115] See Skadden Letter.

not primarily engaged in trading commodity interests.[116] The Commission notes that under the tenets of statutory interpretation, where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent.[117] By the plain language of § 4m(3), this section creates an exemption from the CTA registration requirements of the CEA; commodity pools are discussed only to the extent that the characteristics of the pool enable the CTA to claim relief. The registration category of CPO is not referenced. Therefore, the Commission concludes that the provisions of § 4m(3) do not mandate any exemptions from registration for CPOs. The Commission notes, however, that it has determined to retain the de minimis exemption set forth in § 4.13(a)(3).

Several commenters suggested adding as a prerequisite for exemptive relief under § 4.13(a)(3), registration with the SEC as an investment adviser.[118] The Commission is declining to add SEC registration as part of the criteria for relief under § 4.13(a)(3) because the basis for providing relief is the limited nature of the pool's trading activity rather than its operator's registration status with the SEC. To require the CPO of an exempt pool to be regulated by the SEC would limit the applicability of § 4.13(a)(3), which is not the Commission's intention at this time.

Most commenters suggesting the additional requirement of SEC registration also proposed an increase in the trading threshold, ranging from 20 percent to 50 percent of the pool's liquidation value due to the inclusion of the pool's swaps activity within the trading threshold.[119] As discussed earlier in this release in the context of § 4.5, the Commission believes that a five percent

[116] See MFA Letter.
[117] See Andrus v. Glover Construction Co., 446 U.S. 608 (1980).
[118] See MFA Letter; NFA Letter; Skadden Letter; Schulte Letter; NYSBA Letter; Dechert III Letter; IAA Letter; and Seward Letter.
[119] See MFA Letter; Skadden Letter; NYSBA Letter; Dechert III Letter.

threshold continues to be the appropriate level for exemption or exclusion due to limited derivatives trading. Moreover, the Commission would again note that the inclusion of an alternative net notional test provides CPOs with another, perhaps less restrictive means, of qualifying for the exemption. The Commission believes that trading exceeding five percent of the liquidation value of a portfolio, or a net notional value of commodity interest positions exceeding 100 percent of the liquidation value of a portfolio, evidences a significant exposure to the derivatives markets, and that such exposure should subject an entity to the Commission's oversight.

With respect to the issue of the inclusion of swaps making it more difficult to satisfy the trading threshold, the Commission believes that it would be premature to increase the threshold at this time. Additionally, as stated previously, the inclusion of an alternative net notional test may provides entities with another mechanism for qualifying for the exemption in § 4.13(a)(3). The Commission believes that it may be more appropriate to reassess the trading threshold after collecting data from registered CPOs through Form CPO-PQR. Therefore, the Commission has decided not to increase the trading threshold under § 4.13(a)(3).

Additionally, the Commission believes that it must include swaps within the threshold to enable the most entities to claim relief under § 4.13(a)(3). As stated previously with respect to the amendments to §4.5, the Dodd-Frank Act amended the statutory definition of the terms "commodity pool operator" and "commodity pool" to include those entities that trade swaps.[120] If the Commission were to keep the de minimis test in § 4.13(a)(3) and only include futures and options as the basis for calculating compliance with the threshold, the swaps activities of the CPOs

[120] 7 U.S.C. 1a(10); 1a(11).

would still trigger the registration requirement notwithstanding the exclusion of swaps from the calculus. That is, the purpose of the threshold test is to define a de minimis amount of trading activity that would not trigger the registration requirement. If swaps were excluded, any swaps activities undertaken by a CPO would result in that entity being required to register because there would be no de minimis exclusion for such activity. As a result, one swap contract would be enough to trigger the registration requirement. For that reason, if the Commission wants to permit some de minimis level of swaps activity by CPOs without registration with the Commission, it must do so explicitly in the exemption.[121] Because the Commission has determined that de minimis activity by CPOs does not implicate the Commission's regulatory concerns, the Commission has decided that it is appropriate to include swaps within the trading threshold under § 4.13(a)(3).[122]

Additionally, to enable CPOs to fully exercise the alternative net notional test, the Commission is amending § 4.13(a)(3)(ii)(B) to provide guidance as to the notional value of cleared swaps positions and the ability to net swaps cleared by the same DCO. The Commission believes that this amendment will serve to provide equal ability to claim relief under § 4.13(a)(3) to all CPOs regardless of the types of commodity interests held by their operated pools. Therefore, the Commission is amending § 4.13(a)(3)(ii)(B)(1) to provide that the notional value of a cleared swap is determined consistent with the provisions of part 45 of the Commission's regulations and § 4.13(a)(3)(ii)(B)(2) to provide that swaps cleared by the same DCO may be netted where appropriate.

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[121] Any reference to a de minimis level of swaps activities by registered investment companies only applies in the context of CPO registration by registered investment companies.

[122] The Commission has proposed to amend the definition of "commodity interest" as it appears in § 1.3 to include swaps, consistent with the Dodd-Frank Act. See, 76 FR 33066 (June 7, 2011).

After consideration of the comments and the Commission's stated rationale for proposing to rescind the exemption in § 4.13(a)(3), the Commission has determined to retain the de minimis exemption currently set forth in that section without modification.[123]

3. Comments Regarding a Family Offices Exemption

In response to the Commission's proposed rescission of §§ 4.13(a)(3) and (a)(4), the Commission received numerous comments asking that the Commission adopt an exemption from registration for family offices that is akin to the exemption adopted by the SEC.[124] The commenters noted that prior to the adoption of §§ 4.13(a)(3) and (a)(4), the Commission staff granted relief to family offices on an ad hoc basis, but that when §§ 4.13(a)(3) and (a)(4) were adopted, most family offices availed themselves of those exemptions from registration. The commenters argued that the Commission should have less regulatory concern about family offices because their clientele is necessarily limited to family members and the family offices do not solicit outside of the family unit.

Due to the exemptions previously granted by Commission staff, and the resulting lack of information regarding the activities of CPOs claiming relief thereunder, the Commission does not yet have a comprehensive view of the positions taken and interests held by currently exempt entities. The Commission, therefore, believes that it is prudent to withhold consideration of a family offices exemption until the Commission has developed a comprehensive view regarding such firms to enable the Commission to better assess the universe of firms that may be appropriate to include within the exemption, should the Commission decide to adopt one. Therefore, the

[123] The Commission does not need to amend the language of § 4.13(a)(3) to include swaps within the trading threshold as this section determines eligibility based on the amount of "commodity interests" traded. In a separate rulemaking, the Commission has proposed to amend the definition of the term "commodity interest" to include swaps. See 76 FR 11701 (March 3, 2011).

[124] See 17 CFR 250.202(a)(11)(G)-1.

Commission is directing staff to look into the possibility of adopting a family offices exemption in the future.

The Commission notes that family offices previously relying on the exemption under Regulation § 4.13(a)(3) will not be affected by the rules adopted herein, as the Commission is not rescinding the § 4.13(a)(3) exemption and it will remain available to entities meeting its criteria. The Commission further notes that family offices continue to be permitted to write in on a firm by firm basis to request interpretative relief from the registration and compliance obligations under the Commission's rules and to rely on those interpretative letters already issued to the extent permissible under the Commission's regulations.[125] Therefore, the Commission does not believe an exemption for family offices is necessary at this time.

4. Comments Regarding a Foreign Advisor Exemption

Several commenters suggested that if the Commission determines to adopt the proposed rescissions, it should adopt a foreign advisor exemption similar to that set forth in the Dodd-Frank Act under the Investment Adviser Act of 1940.[126] The commenters expressed concern that the rescission of the exemptions under §§ 4.13(a)(3) and (a)(4) would result in nearly all non-US based CPOs operating a pool with at least one U.S. investor being required to register with the Commission. Commenters also expressed concern that foreign CPOs would have to report the

[125] See 17 CFR 140.99(a)(3) ("An interpretative letter may be relied upon by persons in addition to the Beneficiary."). The most recent letter (CFTC letter 10-25) issued affirming the Division's interpretation that a "family office" is not a pool under § 4.10(d) is available at the Commission's website at: http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/10-25.pdf. See, CFTC Interpretative Letter 00-100 [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,420 (Nov. 1, 2000); CFTC Interpretative Letter No. 96-24, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,653 (March 4, 1996); CFTC Interpretative Letter No. 97-29, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,039 (March 21, 1997); CFTC Interpretative Letter No. 95-35, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,376 (Nov. 23, 1994).

[126] See Section 403 of the Dodd-Frank Act.

entirety of their derivatives activities to the Commission even if foreign regulators also oversee such activities.

Due to the exemptions previously adopted by the Commission, and the resulting lack of information regarding the activities of CPOs claiming relief thereunder, the Commission does not yet have a comprehensive view of the positions taken and interests held by currently exempt entities. The Commission, therefore, believes that it is prudent to withhold consideration of a foreign advisor exemption until the Commission has received data regarding such firms on Forms CPO-PQR and/or CTA-PR, as applicable, to enable the Commission to better assess the universe of firms that may be appropriate to include within the exemption, should the Commission decide to adopt one. Foreign advisors to pools that meet the criteria of § 4.13(a)(3) will be able to continue to operate pursuant to that exemption, if previously claimed, or file notice of claim of exemption under § 4.13(a)(3). Therefore, the Commission is not providing an exemption for foreign advisors at this time.

5. Comments Regarding the Proposed Rescission of § 4.13(a)(4)

In the Proposal, the Commission proposed to rescind the exemption in § 4.13(a)(4) for operators of pools that are offered only to individuals and entities that satisfy the qualified eligible person standard in § 4.7 or the accredited investor standard under the SEC's Regulation D.[127] In the Proposal, the Commission stated that it

> [S]eeks to eliminate the exemptions under §§ 4.13(a)(3) and (4) for operators of pools that are similarly situated to private funds that previously relied on the exemptions under §§ 3(c)(1) and (7) of the Investment Company Act and § 203(b)(3) of the Investment Advisers Act. It is the Commission's view that the operators of these pools should be subject to similar regulatory obligations, including proposed form CPO-PQR, in order

[127] See 17 CFR 4.13(a)(4).

> to provide improved transparency and increased accountability with respect to these pools. The Commission has determined that it is appropriate to limit regulatory arbitrage through harmonization of the scope of its data collection with respect to pools that are similarly situated to private funds so that operators of such pools will not be able to avoid oversight by either the Commission or the SEC through claims of exemption under the Commission's regulations.[128]

The Commission received several comments regarding its proposed rescission.[129] Several commenters argued that the Commission should consider retaining the exemption in § 4.13(a)(4) for funds that do not directly invest in commodity interests, but do so through a fund of funds structure, and who are advised by an SEC registered investment adviser. Due to the exemptions previously adopted by the Commission, and the resulting lack of information regarding the activities of CPOs claiming relief thereunder, the Commission does not yet have a comprehensive view of the positions taken and interests held by currently exempt entities. The Commission, therefore, believes that it is prudent to withhold consideration of a fund of fund exemption until the Commission has received data regarding such firms on Forms CPO-PQR and/or CTA-PR, as applicable, to enable the Commission to better assess the universe of firms that may be appropriate to include within the exemption, should the Commission decide to adopt one. Therefore, the Commission is not providing an exemption for funds of funds at this time. The Commission notes, however, that staff will consider requests for exemptive relief for funds of funds on a case by case basis.

The Commission received two comments that argued that the rescission of § 4.13(a)(4) is inconsistent with the private offering framework under the SEC's Regulation D and that the

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[128] 76 FR 7976, 7986 (Feb 12, 2011).
[129] See comment letter from Sidley Austin LLP (April 12, 2011) ("Sidley Letter"); MFA Letter; NYSBA Letter; comment letter from Cranwood Capital Management (April 12, 20110 ("Cranwood Letter"); Dechert III Letter; and comment letter from Nantucket Multi Managers, LLC (April 12, 2011) ("Nantucket Letter").

rescission would result in the end of private offerings.[130] The Commission believes that this analysis is flawed and is the result of a mistaken conflation of the private fund structure under the Commission's rules and privately-offered ownership interests under the SEC's rules. The Commission notes that the rescission of § 4.13(a)(4) does not preclude CPOs from utilizing Regulation D with respect to the offering of pool interests because the availability of relief from the registration of an offering under Regulation D does not require that the entity involved be exempt from regulation. Therefore, the Commission continues to believe that rescission of § 4.13(a)(4) is appropriate for the reasons stated in the Proposing Release and that it is consistent with the registration of investment advisers of such exempt funds with the SEC.

One commenter expressed concerns about the fact that the class of eligible participants in a pool operated pursuant to § 4.13(a)(4) is broader than that for a pool qualifying under § 4.7.[131] Specifically, this commenter noted that under § 4.13(a)(4), participants may include non-natural participants that are QEPs under § 4.7 or accredited investors under § 230.501(a)(1)-(3), (a)(7) or (a)(8),[132] whereas § 4.7 does not include such participants as QEPs.[133] The Commission recognizes that this discrepancy may result in certain entities being unable to claim relief under § 4.7; however, due to the exemptions previously adopted by the Commission, and the resulting lack of information regarding the activities of CPOs claiming relief thereunder, the Commission does not yet have a comprehensive view of the positions taken and interests held by currently exempt entities and until the Commission has more information regarding the universe of entities affected,

[130] See MFA Letter; and NYSBA Letter.
[131] MFA raised this concern during several meetings with Commission staff, although it did not provide any detail regarding the scope of its concerns and the topic was not discussed in the written comments submitted regarding this rulemaking.
[132] 17 CFR § 4.13(a)(4)(ii)(B).
[133] 17 CFR § 4.7(a).

the Commission does not believe that it is appropriate to amend § 4.7 to reflect the nature of participants in funds previously entitled to relief under §4.13(a)(4). After the Commission has collected data from such entities through Form CPO-PQR, the Commission may reconsider this issue. The Commission also notes that staff will consider requests for exemptive relief from the limitations of § 4.7 on a case-by-case basis.

One commenter argued that rescission is not necessary because any fund that seeks to attract qualified eligible purchasers is already required to maintain oversight and controls that exceed those mandated by part 4 of the Commission's regulations such that any regulation imposed would be duplicative and unnecessarily burdensome.[134] That commenter further stated that:

> We are accustomed to intense scrutiny from potential investors that frequently includes independent background checks of our key employees, onsite visits that include interviews with our traders and other key personnel, interviews of our third-party administrator and our auditors, interviews of officials of our clearing broker, interviews of officers at our custodial bank, and bulk delivery of transactional data for independent analysis. To say that such information-gathering goes far beyond the contents of a mandated disclosure document is a gross understatement.[135]

The commenter primarily focused on the significant level of controls that the fund operator implements independent of regulation. The Commission believes that, contrary to the commenter's arguments as to the import of that fact, such controls and internal oversight should facilitate compliance with the Commission's regulatory regime. Moreover, the Commission continues to believe that registration serves important regulatory purposes as stated previously in this release in the context of the amendments to § 4.5.

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[134] See Cranwood Letter.
[135] See Cranwood Letter.

The Commission has determined to eliminate the exemption in § 4.13(a)(4) because, as stated in the proposal, there are no limits on the amount of commodity interest trading in which pools operating under this regulation can engage. That is, it is possible that a commodity pool that is exempted from registration under § 4.13(a)(4) could be invested solely in commodities, which, in the Commission's view, necessitates Commission oversight to ensure adequate customer protection and market oversight. Therefore, the Commission adopts the rescission of § 4.13(a)(4) as proposed.

The Commission received several comments regarding the timing of the implementation of the rescission of § 4.13(a)(4).[136] Two commenters suggested that 18 months is the appropriate time period to permit entities to prepare for compliance with the Commission's registration and compliance regime.[137] One commenter suggested that the Commission provide "sufficient time," but provided no proposed specific period of time.[138] Several commenters asserted that currently exempt entities should be grandfathered.[139]

The Commission recognizes that entities will need time to come into compliance with the Commission's regulations. The Commission does not, however, believe that the process of preparing for Commission oversight necessitates an 18 month time period. Based on the comments received indicating that a certain portion of entities currently claiming relief under § 4.13(a)(4) already have robust controls in place independent of Commission oversight, the Commission believes that entities currently claiming relief under § 4.13(a)(4) should be capable of

[136] See NYSBA Letter; AIMA Letter; Schulte Letter; comment letter from Fulbright & Jaworski L.L.P. (April 12, 2011) ("Fulbright Letter"); SIFMA Letter; Seward Letter; Katten Letter; and comment letter from TIF Fund Management LLC (May 19, 2011) ("TIF Letter"); NFA Letter; IAA Letter; and Dechert Letter.
[137] See Schulte Letter; and Fulbright Letter.
[138] See NFA Letter. See also, IAA Letter.
[139] See NYSBA Letter; AIMA Letter; Schulte Letter; Fulbright Letter; SIFMA Letter; Seward Letter; and Katten Letter.

becoming registered and complying with the Commission's regulations within 12 months following the issuance of the final rule. For entities that are formed after the effective date of the rescission, the Commission expects the CPOs of such entities to comply with the Commission's regulations upon formation and commencement of operations.

The Commission does not believe that "grandfathering" is appropriate in this context. As the Commission stated in its Proposal, part of the purpose of rescinding § 4.13(a)(4) is to ensure that entities that are engaged in derivatives trading are subject to substantively identical registration and compliance obligations and oversight by the Commission.[140] Grandfathering is not consistent with the stated goals of the Commission's rescission and would result in disparate treatment of similarly situated entities.

Therefore, the Commission will implement the rescission of § 4.13(a)(4) for all entities currently claiming exemptive relief thereunder on December 31, 2012, but the rescission will be implemented for all other CPOs upon the effective date of this final rulemaking.

D. Comments Regarding the Proposed Annual Notices for Continued Exemptive or Exclusionary Relief

In the Proposal, the Commission proposed to require annual reaffirmance of a claim of exemption or exclusion from registration as a CPO or CTA. In the Proposal, the Commission stated its position that an annual notice requirement would promote improved transparency regarding the number of entities either exempt or excluded from the Commission's registration and compliance programs, which is consistent with one of the primary purposes of the Dodd-Frank Act. Moreover, the Commission stated its belief that an annual notice requirement would enable

[140] 76 FR 7976, 7986 (Feb. 12, 2011).

the Commission to determine whether exemptions and exclusions should be modified, repealed, or maintained as part of the Commission's ongoing assessment of its regulatory scheme.

The Commission received three comments on this provision in the Proposal.[141] One commenter supported the adoption of an annual notice requirement, but suggested that the due date of the notice be changed from the exemption's original filing date to a calendar-year end for all filers.[142] The Commission agrees that moving the due date for the annual notice requirement to the calendar-year end for all filers may be more operationally efficient. Therefore, the Commission will adopt the annual notice requirement mandating that the notice be filed at the calendar year-end rather than the anniversary of the original filing.

Two commenters suggested that the 30-day time period for filing was not adequate to enable firms to comply.[143] One commenter proposed a 60-day time period,[144] whereas the other commenter proposed 90 days as the necessary amount of time.[145] The Commission recognizes that the proposed 30-day filing period may not be adequate due to the ramifications of an entity's failure to file its annual notice in a timely manner, which would result in the exemption or exclusion being deemed withdrawn. This issue is particularly important because of the NFA's Bylaw 1101, which prohibits NFA members from conducting business with non-members. Should an entity fail to file its annual notice within the requisite time frame, its NFA membership could be deemed withdrawn, which could potentially impact numerous other NFA members. The Commission believes that extending the filing period from 30 days to 60 days will provide NFA with adequate time to follow up with filing entities to ensure that a filing is not omitted

[141] See NFA Letter; AII Letter; and SIFMA Letter.
[142] See NFA Letter.
[143] See NFA Letter; and SIFMA Letter.
[144] See NFA Letter.
[145] See SIFMA Letter.

inadvertently and to limit the adverse consequences for other NFA members. The Commission does not, however, believe that 90 days is necessary as it intends for such notice to be filed electronically with NFA and for NFA's filing system to pre-populate the notice with the names and NFA IDs of all exempt pools operated by the CPO with an option to choose to reaffirm the exemptions for all exempt pools. The Commission believes that this minimizes both the time and expense burdens on the CPO and should enable all entities to comply with the requirement within 60 days.

E. Comments Regarding the Proposed Risk Disclosure Statement for Swaps in § 4.24 and § 4.34

The Commission also proposed adding standard risk disclosure statements for CPOs and CTAs regarding their use of swaps to §§ 4.24(b) and 4.34(b), respectively.[146]

The Commission received three comments with respect to the proposed standard risk disclosure statement for swaps.[147] Two argued that a standard risk disclosure statement is not the appropriate way to disclose the risks inherent in swaps activity to participants or clients.[148] Specifically, those commenters argued that the use of swaps by CPOs and CTAs varies and depending on the reason for using swaps, different risks may be implicated. Furthermore, those commenters also noted that the proposed risk disclosure statement is inconsistent with recent SEC guidance to registered investment companies to avoid generic disclosures. The Commission respectfully disagrees with the assertions of those commenters who believe that a standard risk disclosure statement is not appropriate. The Commission believes that a standardized risk disclosure statement addressing certain risks associated with the use of swaps is necessary due to

[146] 76 FR 7976, 7986 (Feb. 12, 2011).
[147] See SIFMA Letter; Fidelity Letter; and comment letter from Chris Barnard (Feb. 26, 2011) ("Barnard Letter").
[148] See SIFMA Letter; and Fidelity Letter.

the revisions to the statutory definitions of CPO, CTA, and commodity pool enacted by the Dodd-Frank Act.[149] Moreover, it is the Commission's position that concerns about "one-size-fits-all" disclosure of risks are addressed through additional disclosures required under §§ 4.24(g) and 4.34(g), which govern disclosures regarding the risks associated with participating in the offered commodity pool or program.

With respect to the comments submitted regarding the conflicting requirements imposed on registered investment companies whose advisers are required to register as CPOs pursuant to amended § 4.5,[150] such concerns will be addressed through the proposed modifications to the Commission's compliance regime that will be applicable to registered investment companies overseen by both the SEC and the Commission.

Additionally, the Commission received one comment that supported the adoption of the standard risk disclosure statement for swaps, but suggested that the Commission consider whether the wording needed to be modified depending on whether the swaps were cleared or uncleared.[151] Based on the language proposed, the Commission does not believe that different language must be adopted to account for the differences between cleared and uncleared swaps. In particular, the Commission notes that the proposed risk disclosure statement is not intended to address all risks that may be associated with the use of swaps, but that the CPO or CTA is required to make additional disclosures of any other risks in its disclosure document pursuant to §§ 4.24(g) and 4.34(g) of the Commission's regulations. Moreover, the language of the proposed risk disclosure statement is conditional and does not purport to assert that all of the risks discussed are applicable in all circumstances. For the reasons discussed above and those stated in the Proposal, the

[149] See 7 U.S.C. 1a(10), 1a(11), and 1a(12).
[150] See SIFMA Letter; and Fidelity Letter.
[151] See Barnard Letter.

Commission adopts the proposed risk disclosure statements for CPOs and CTAs regarding swaps.[152] These additional risk disclosure statements will be required for all new disclosure documents and all updates filed after the effective date of this final rulemaking.

F. Section 4.27 and Forms CPO-PQR and CTA-PR

1. General Comments

The Commission received numerous comments in response to proposed § 4.27, which requires CPOs and CTAs to report certain information to the Commission on Forms CPO-PQR and CTA-PR, respectively. Several commenters questioned whether the data collection was necessary for the Commission's oversight of its registrants.[153] Others asserted that certain groups, such as registered investment companies or family offices, should be exempted from completing the data collection.[154]

The Commission's new reporting requirements supplement SEC reporting requirements for dual registrants that must file Form PF with the SEC by virtue of their dual registration status. Information about CTAs and CPOs that are non-dual registrants is necessary for the Commission to identify significant risk to the stability of the derivatives market and the financial market as a whole. Following the recent economic turmoil, the Commission has reconsidered the level of regulation that it believes is appropriate for entities participating in the commodity futures and derivatives markets. With respect to the assertion that registered investment companies should not

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[152] These risk disclosure statements do not affect the swap disclosure requirements mandated in CEA Section 4s(h)(3)(B) and rules relating to that statutory provision. See proposed § 23.431 Disclosure of Material Information, Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 75 FR 80638 (Dec. 22, 2010). In addition, managed accounts that do not convey discretionary authority to the CTA will require the pass through of the swap disclosures in any final rule promulgated pursuant to 4s(h)(3)(B).

[153] See Fidelity Letter; and AIMA Letter.

[154] See ICI Letter; AIMA Letter; and comment letter from K&L Gates LLP (Feb. 12, 2011) ("K&L Letter").

be required to file Form CPO-PQR, the Commission believes that it is important to collect the data in Form CPO-PQR from registered investment companies whose activities require CPO registration to assess the risk posed by such investment vehicles to derivatives markets and the broader financial system. Consequently, the Commission intends to require from registered investment companies that are also registered as CPOs the same information that it is requiring from entities solely registered as CPOs. Additionally, the Commission notes that to the extent that the entity registered as the CPO for the registered investment company is registered as an investment adviser and is required to file Form PF with the SEC, the activities of the registered investment company may be reported on Form PF as well.

The Commission further believes that the same reasoning applies with respect to the collection of data from family offices. To enable the Commission to evaluate a potential family offices exemption following the collection and analysis of data regarding their activities, the Commission believes that it is essential that family offices remain subject to the data collection requirements to the extent that such entities are not entitled to claim relief pursuant to the Commission's interpretative guidance regarding family offices.

One commenter recommended that the Commission clarify the filing obligations for CPOs and CTAs that are required to file Form PF with the SEC and to streamline the reporting obligations.[155] Another commenter argued that a very large private fund that has a limited amount of derivatives trading should not be subject to Schedule C of Form CPO-PQR.[156] As stated in the Proposal, CPOs that are dually registered with the SEC and that file Form PF must still file Schedule A with the Commission, and CTAs must still file Form CTA-PR. The Commission

[155] See Fidelity Letter.
[156] See AIMA Letter; SIFMA Letter; and Fidelity Letter.

intends to adopt § 4.27 as proposed and permit dual registrants to file Form PF with the SEC in lieu of completing Schedules B and/or C of Form CPO-PQR. The Commission never intended to require very large dual registrants to file anything more than the general identifying information required on Schedule A with the Commission, and neither § 4.27 nor the forms require dual registrants to file Schedules B or C if they are filing Form PF.

The Commission has modified both Schedule A of Form CPO-PQR and Form CTA-PR so that both documents are only soliciting general demographic data. The Commission has moved Question 12, which asked for information regarding position information, from proposed Schedule A to Schedule B of Form CPO-PQR in an effort to avoid collecting redundant information from dual registrants. Additionally, the Commission is not adopting Schedule B from Form CTA-PR, and therefore, will be limiting the information collected from registered CTAs to demographic data and the names of the pools advised by the CTA.

One commenter questioned whether the information collected on Forms CTA-PR and CPO-PQR will provide the Commission with real-time data that will enable it to have an accurate and timely picture of a CTA's activities and operating status.[157] The Commission recognizes the limitations of the data collection instruments with respect to the timeliness of the information requested. The Commission believes, however, that the forms strike the appropriate balance between the time needed to compile complex data and the Commission's need for timely information. Moreover, the Commission believes that the information required on Form CPO-PQR and CTA-PR will be useful because it will allow the Commission to better deploy its enforcement and examination resources.

[157] See Barnard Letter.

Another commenter questioned whether the Commission possessed the staffing and financial resources necessary to meaningfully use such data as part of its oversight.[158] The Commission recognizes that the resources available to it are limited. To that end, the Commission, as stated in the Proposal, intends to coordinate with the NFA to accomplish the analysis necessary to make full use of the data collected from Commission registrants.

In addition, the Commission intends for the data to be collected from registrants in an electronic format, which will enable the Commission to leverage its technology and to require less intensive staff time to achieve the desired results. The use of an electronic format will enable the FSOC to conduct additional analysis of the data collected in the event that the FSOC requests such information from the Commission, without significant consumption of Commission resources. For these reasons, the Commission believes that it has the tools necessary to make full use of the data that it intends to collect on Forms CPO-PQR and CTA-PR, notwithstanding the Commission's current staffing and financial resources.

2. Comments Regarding the Reporting Thresholds

The Commission received several comments regarding the appropriate reporting thresholds for the various schedules of Form CPO-PQR.[159] The commenters stated that $150 million in assets under management was too low of a threshold for entities to be categorized as mid-sized and required to file Schedule B. Rather, the commenters urged the Commission to increase the threshold to $500 million in assets under management.[160] The Commission believes that $150 million in assets under management is still the appropriate threshold for mid-sized CPOs. The Commission will retain this threshold because it is consistent with the threshold for advisers filing

[158] See Dechert Letter.
[159] See AIMA Letter; MFA II Letter; Seward Letter. See also, AIMA II Letter.
[160] See AIMA Letter.

Section 1 of Form PF, which is substantively similar to Schedule B of Form CPO-PQR, and it will ensure comparable treatment of entities of similar magnitude.

These commenters also suggested that the Commission increase the threshold for large CPOs from $1 billion to $5 billion in assets under management.[161] The Commission has decided not to increase the large CPO threshold to $5 billion. The Commission has decided, however, to increase the threshold from $1 billion to $1.5 billion. The Commission believes that increasing the threshold to $1.5 billion will reduce the number of CPOs required to file Schedule C of Form CPO-PQR, but will still represent a substantial portion of the assets under management by registered CPOs. Moreover, the Commission notes that this modification is consistent with the revised threshold for large hedge fund advisers that it recently adopted with respect to Form PF.[162] The Commission believes that increasing the threshold beyond $1.5 billion could limit the Commission's access to information necessary to oversee entities that could pose a risk to the derivatives markets or the financial system as a whole.

3. Comments Regarding Harmonization with the SEC's Compliance Regime

The Commission received numerous comments on harmonizing Forms CPO-PQR and CTA-PR with Form PF.[163] The Commission has considered comments received on the Form PF proposed jointly with the SEC that address harmonization of the CFTC and SEC forms in addition to the comments received specifically on the Proposal. Two commenters argued that the Commission and the SEC should use the same metrics for measuring assets under management for

[161] See AIMA Letter; MFA II Letter; Seward Letter.
[162] 76 FR 71128, 71135 (Nov. 16, 2011).
[163] See AIMA Letter; MFA II Letter; Dechert Letter; Seward Letter; IAA Letter; Fidelity Letter; AIMA II Letter; K&L Letter; MFA Letter; and SIFMA Letter.

purposes of determining filing obligations.[164] As noted several times in this preamble, the Commission has sought to harmonize Forms CPO-PQR and CTA-PR to the extent possible; however, it is not appropriate in all circumstances. For example, the SEC and the CFTC use different methods for determining the threshold for reporting assets under management. In order to determine whether a CPO meets the asset threshold for classification as a mid-sized or large CPO, Form CPO-PQR requires the use of the aggregated gross pool assets under management. Conversely, Form PF defines "regulatory assets under management" as the gross value of the securities portfolio as reported on the SEC's Form ADV.[165] Additionally, Form CPO-PQR uses net assets under management as the method for determining whether a commodity pool is a large commodity pool for filing purposes, whereas Form PF uses net regulatory assets. In the Commission's view, gross assets under management and net asset value are more appropriate means for determining filing obligations for CPOs and large commodity pools because entities registered with the Commission are familiar with the use of net asset value for other purposes including determining the required frequency of reporting to participants.[166] Moreover, the Commission believes that it is inappropriate for it to incorporate the SEC definitions of regulatory assets under management and net regulatory assets under management into Form CPO-PQR as those terms are not consistent with the existing CFTC regulatory framework.[167] The use of net asset value is consistent with the longstanding utilization of net asset value in U.S. GAAP and in

[164] See AIMA Letter; and MFA II Letter.
[165] Form PF defines net assets under management as regulatory assets under management less liabilities 76 FR 71128, 71136 (Nov. 16, 2011).
[166] Id.
[167] Id. Additionally, the Commission notes that Form PF also asks for net assets under management in question 3 of Section 1.

the Commission's regulations.[168] Therefore, the Commission does not believe that its use of net asset value requires any additional calculation by dual registrants beyond that required to complete Form PF.

Several commenters argued that the Commission does not need to collect information through Forms CPO-PQR and CTA-PR because it already receives information through the Large Trader Reporting System and Form 40.[169] Large Trader Reporting and Form 40 do not provide the information regarding the relationship between a large position held by a pool and the rest of the pool's other derivatives positions and securities investments. The Commission believes that the scope of information sought through Forms CPO-PQR and CTA-PR will provide it with substantially more detail regarding the activities of entities engaged in derivatives trading and will better enable it to assess the risk posed by a pool or CPO as a whole.

Several commenters also urged the Commission to consider coordinating with the SEC to promulgate a single form.[170] The Commission believes that it is most efficient for Commission-only registrants to use a form that is based upon the format of NFA's Form PQR, with which current registrants are already familiar. Currently registered CPOs have been filing NFA's Form PQR on a quarterly basis for more than one year and have experience using NFA's interface for the collection of data. The Commission recognizes that new registrants will not have any experience with NFA's Form PQR or NFA's filing system; however, the same would be true if the Commission were to implement an altogether new system. Therefore, the Commission believes that by continuing to use the system developed by NFA for collecting data from CPOs and CTAs,

[168] See, e.g., 17 CFR 4.22.
[169] See Fidelity Letter; and K&L Letter.
[170] See AIMA II Letter; Seward Letter; MFA Letter; AIMA Letter; and SIFMA Letter.

it is minimizing the burden on current registrants because they will not be required to learn a new system, without adding any additional burden to new registrants.

Several commenters raised concerns about how affiliated entities will be treated on the forms.[171] The Commission believes that affiliated entities should be permitted, but should not be required, to report on a single form with respect to all affiliates and the pools that they advise. This position is consistent with the treatment of affiliated entities on Form PF. Furthermore, the Commission believes that where a pool is operated by one or more co-CPOs, only one CPO should report on the activities of the jointly operated pool, but that CPO must disclose the identities of the other co-CPOs. The Commission believes that this will eliminate the potential for double counting of pool assets if all co-CPOs were required to report on the jointly operated pool.

4. Comments Regarding Funds of Funds

The Commission also received one comment regarding issues unique to fund of funds and feeder funds.[172] Specifically, this commenter asserted that funds of funds that invest in unaffiliated commodity pools are "not in the business of trading commodity interests," and therefore, should not be subject to reporting obligations on Form CPO-PQR.[173] This commenter further argues that funds of funds reporting is not necessary because either the Commission or the SEC will oversee the investee fund and that funds of funds likely do not have access to information with sufficient detail to respond to the questions in Form CPO-PQR regarding size, strategy, or positions held by the investee fund.[174]

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[171] See MFA II Letter; MFA Letter; AIMA Letter; SIFMA Letter; and Seward Letter.
[172] See MFA II Letter.
[173] Id.
[174] Id.

The Commission disagrees with the commenter's assertion that funds investing in unaffiliated commodity pools are not in the business of trading commodity interests. Although it is true that the fund does not directly engage in such trading, it is the position of the Commission that a fund investing in an unaffiliated commodity pool is itself a commodity pool. This interpretation is consistent with the statutory definition of commodity pool, which draws no distinctions between direct and indirect investments in commodity interests.[175] Moreover, the Commission believes that permitting indirect investment in commodity interests to occur without Commission oversight would create an incentive for entities to avoid direct investment in commodity interests and possibly increase the opacity of the market. Therefore, the Commission concludes that a fund that invests in an unaffiliated commodity pool is a commodity pool for purposes of the CEA and the Commission's regulations promulgated thereunder.

With respect to the commenter's assertion that the funds of funds need not report because the investee fund will be subject to the jurisdiction of either the Commission or the SEC, the Commission must again disagree. As the commenter itself noted in its comment, the funds of funds could be invested in a fund whose adviser or operator is not required to report due to exemptive relief granted by either the Commission or the SEC. The Commission acknowledges that a fund of funds may not have access to the kind of information necessary to respond to all of the data elements in Schedules B and C with respect to the investment activities of its investee funds. Nevertheless, the Commission believes that requiring basic information about the investment in the investee funds without requiring that funds of funds complete the additional detail strikes an appropriate balance between recognizing the limitations of the information

[175] See 7 U.S.C. 1a(11).

available to funds of funds and enabling the Commission to analyze and monitor the levels of interconnectedness among a CPO's funds. The Commission believes that a fund of funds should still be required to provide at a minimum the name of the investee fund(s) and the size of its investment(s) in such funds.

Accordingly, the Commission is adding a question to Schedule A of Form CPO-PQR requesting the names of the investee funds and the size of the fund of funds' investment in the investee funds. The Commission is also adding an instruction to Form CPO-PQR permitting the CPO of a fund of funds to exclude any assets invested in the equity of commodity pools or private funds for purposes of determining the CPO's reporting obligations. The CPO must, however, treat these assets consistently for purposes of Form CPO-PQR. For example, an adviser may not include these assets for purposes of certain questions such as those regarding borrowing, but disregard such assets for purposes of determining the reporting thresholds. This new instruction will permit a CPO to disregard investments in commodity pools or private funds, but would not allow a CPO to disregard the liabilities of the fund, even if incurred due to the investment in the underlying fund. Moreover, if any of the CPO's commodity pools invests substantially all of its assets in the equity of other commodity pools or private funds and, aside from those investments, holds only cash, cash equivalents, and instruments intended to hedge currency risk, the CPO may complete only Schedules A and B with respect to that fund and otherwise disregard such assets for reporting purposes. These instructions are consistent with those instructions adopted as part of the joint Form PF, and the Commission believes that this treatment of funds of funds reduces the burden of reporting for CPOs and improves the quality of the data obtained by the Commission. Therefore, the Commission is adding a general question regarding funds of funds, but is otherwise

permitting CPOs to disregard the assets of such funds that are invested in other commodity pools or private funds for reporting purposes.

5. Adopted Modifications to Form CPO-PQR

The Commission has decided to make several additional revisions to Form CPO-PQR in addition to those discussed previously. The Commission believes that these revisions are necessary to provide clarification, decrease the burden imposed on registrants, and further harmonize Form CPO-PQR with Form PF.

a. Instructions

As discussed previously, the Commission has decided to revise certain instructions governing the completion of Form CPO-PQR. Specifically, the Commission has determined that it is appropriate to raise the threshold for large CPOs from $1 billion to $1.5 billion in an effort to reduce the number of CPOs required to report on a quarterly basis and respond to commenters' concerns, but still provide the Commission with the information necessary to effectively oversee such large market participants. The Commission has also determined to modify the frequency of reporting for filers of Form CPO-PQR. As adopted, all CPOs, other than large CPOs, will be required to file Schedule A on an annual basis; mid-size CPOs will be required to file Schedule B on an annual basis; and large CPOs will be required to file Schedules A, B, and C on a quarterly basis.

The Commission received several comments asserting that the 15-day period for reporting was not sufficient to permit reporting CPOs to complete and file the form and all suggested

extending the period to 30 or 45 days.[176] The Commission agrees that reporting CPOs will need additional time in which to submit the various schedules of Form CPO-PQR.

Upon further consideration, the Commission believes that it is appropriate to require all CPOs, other than large CPOs, to file Schedule A within 90 days of the end of the calendar year. This time period coincides with the annual questionnaire required by NFA of its entire population of member CPOs and with the vast majority of annual report filings for commodity pools. The revised deadline will enable CPOs, other than large CPOs, to benefit from the availability of the NFA annual questionnaire and the availability of the information in CPO annual report filings. Moreover, because the Commission has transferred the pool position information from Schedule A to Schedule B, the Commission believes that non-large CPOs should be able to comply with filing basic demographic data within 90 days.

With respect to mid-sized CPOs filing Schedule B, the Commission believes that 90 days is an adequate time period for compiling data and completing that schedule. The Commission notes that CPOs are generally required to file annual reports for their pools within 90 days of their fiscal year end, most of which coincide with the calendar year end. The Commission believes that the alignment of pools' fiscal years with the calendar year end should facilitate the preparation of Schedule B and reduce the burden imposed on mid-size CPOs because some of the information required will be similar to that included in a pool's annual financial statements.

With respect to the quarterly reporting by large CPOs on Schedules A, B, and C, the Commission believes that 60 days is a sufficient amount of time to complete those schedules for large CPOs. The Commission notes that the entities required to file on a quarterly basis have a

[176] See NFA Letter; Seward Letter; and AIMA Letter.

significant amount of assets under management, and as such, the Commission anticipates that such entities routinely generate the type of information requested on Schedules B and C as part of their internal governance. Accordingly, the Commission will require large CPOs to file Schedules B and C within 60 days following the end of the reporting period as defined in Form CPO-PQR.

In October 2011, the Commission adopted Form PF as a joint reporting form with the SEC. The terms of Form PF permit dually registered entities that are filing the form for their private funds under advisement to report on the activities of their other commodity pools as well. Entities that choose to file Form PF for all of their funds under advisement will still be required to file Schedule A on an annual basis, which is consistent with the terms of the Proposal. The instructions of Form CPO-PQR have been modified to reflect this change.

The Commission has also determined to omit the statement that the failure to answer all required questions completely and accurately may severely impact your ability to operate. The Commission does not believe that such language is necessary to inform registered CPOs of their obligations under the CEA and the Commission's regulations to comply with such obligations in good faith.

Additionally, the Commission has concluded that it should clarify the obligations of co-CPOs of a pool with respect to the submission of Form CPO-PQR. The Commission has amended the instructions to the form to clarify that for co-CPOs, the CPO with the greater assets under management overall is required to report for the co-operated pool. Furthermore, if a pool is operated by co-CPOs and one of the CPOs is also a registered investment adviser, the non-investment adviser CPO will still be obligated to file the applicable sections of Form CPO-PQR regardless of whether the investment adviser CPO filed a Form PF. The Commission believes that

this will prevent the possibility of double counting and unnecessary duplicative filings regarding co-operated pools.

b. Schedule A

Schedule A seeks basic identifying information about the CPO, each of its pools, and any services providers used. The Commission has decided to adopt Schedule A as proposed with the following revisions. In question 3 of part 2, the Commission has added a question asking whether the pool is operated by co-CPOs and for the name of the other CPO(s). This question will enable the Commission to ensure that only one CPO is filing with respect to each co-operated commodity pool. In addition, question 12 of part 2, which asked for information regarding the pool's trading strategies, has been moved to Schedule B, both in response to a commenter's suggestion[177] and in an effort to ensure that dual registrants are not required to file extensive duplicative information on Schedule A that they are already providing on Form PF.

The Commission added a question asking for the telephone number and email for the contact person for the reporting CPO as this was inadvertently omitted in the Proposal. Also, the Commission added a subpart h. to question 10 regarding the base currency used by the CPO for the particular pool for which it is reporting. This question was inadvertently omitted but is necessary for the Commission to fully utilize the information reported regarding the changes in the pool's assets under management.

The Commission added subparts to question 12 regarding prospective risks for the imposition of "gates" and restrictions on redemption of participant withdrawals. The terms of question 12, as proposed, only seek information on a retrospective basis, which, although useful to

[177] See AIMA Letter.

the Commission in assessing overall issues regarding the imposition of restrictions on redemption, does not assist the Commission in assessing possible sources of prospective risk to the market and pool participants. Moreover, question 12, as proposed, did not capture information about pools that have procedures in place governing the imposition of restrictions on redemptions, but whose restrictions have not been triggered. The Commission believes that the modifications to this question solicits such information and will provide the Commission with a more complete understanding of the role of restrictions on redemptions in the operation of commodity pools. Moreover, the Commission believes that the request for additional information regarding the potential imposition of restrictions on redemptions is consistent with the tenor and intent of question 12 as proposed.

The Commission also has made numerous non-substantive technical amendments in Schedule A, including formatting corrections, the deletion of the term "carrying" from question 5 in part 2, and the addition of two months that were inadvertently omitted from the monthly rate of return table in part 2, question 11.

c. Schedule B

Mid-sized and large CPOs will be required to complete Schedule B, which will solicit data about each pool operated by these CPOs. The Commission has decided to adopt Schedule B with the following revisions.

In question 1, subpart d, the Commission has decided to change the format of the question from a pull-down list of options to a chart, consistent with the format used for substantively identical question 20, section 1c in Form PF. The Commission believes that the chart format change will add clarity to the question and will facilitate the completion by registrants. The Commission also has added a column requesting the percentage of the pool's capital invested in

each strategy. This additional information aligns Form CPO-PQR with the information requested in Form PF and also provides the Commission with the means to assess the risk that a pool derives from its borrowing activities.

The Commission has also amended question 1 to add a subpart g asking the reporting CPO to report the percentage of the commodity pool's net asset value that is traded pursuant to a high frequency trading strategy. This subpart previously appeared as part of the chart in question 1 regarding investment strategies. The Commission believes that denoting the issue of high frequency trading as its own subpart of question 1 will enhance the clarity of the question and make the data gained by the Commission more usable in its assessment of risks posed to the derivatives markets.

The Commission is amending question 2 to include the percentage of a pool's borrowings from U.S. and non-U.S. creditors that are not "financial institutions," as that term is defined in Form CPO-PQR, as separate line items. This revision parallels the structure of subparts b and c of that question.

Finally, the Commission has made several non-substantive corrections/alterations, including modifying the format of question 3 to provide a more user-friendly interface for reporting funds and combining several subparts into charts, correcting a typographical error in question 5, adding the question that was formerly question 12 of Schedule A to Schedule B as question 6, and expanding several categories of investments to provide a parallel level of detail among the asset classes.

d. Schedule C

Schedule C requests information about the pools operated by large CPOs on an aggregated and pool by pool basis. The Commission is adopting Schedule C as proposed with the following revisions.

Part 1

The questions in part 1 of Schedule C seek information for all of the pools operated by the large CPO on an aggregate basis.

Question 1 requires a CPO to report a geographical breakdown of investments held by the pools that it operates. The Commission has modified this question to require a less detailed breakdown by focusing on regions as opposed to individual countries and has added a separate disclosure regarding investment in certain countries of interest. The Commission expects that this revision will reduce the burden of responding to this question because the less granular categories should permit more CPOs to rely on classifications that they already use.

The Commission has determined that question 3, which seeks information regarding the duration of the pools' fixed income investments on an aggregate basis, is redundant in light of question 9 in part 2 of Schedule C. Question 9 in part 2 of Schedule C asks for the same information on a pool by pool basis. For that reason, the Commission has deleted question 3 from part 1 of Schedule C.

Part 2

Part 2 of Schedule C seeks information from large CPOs on an individual pool basis for each operated "large pool" as that term is defined in Form CPO-PQR. The Commission has revised subpart c of question 3 to be a yes/no response with respect to whether the pool used a central clearing counterparty ("CCP") during the reporting period. The Commission believes that this is less burdensome and provides it with sufficient information regarding the use of CCPs

because the CPO's relationship is with the swap dealer, futures commission merchant, or direct clearing member rather than directly with the CCP.

In subpart b of question 4, the Commission has made several revisions correcting the technical terminology used with respect to "value at risk" ("VaR"). These revisions are non-substantive. The Commission also added a new subpart c to question 4, which asks the CPO whether it uses any metrics other than VaR for risk management purposes for the reporting fund. The Commission believes that this information will be useful as it continues to amend Form CPO-PQR as necessary to obtain relevant information from registrants. Because of the addition of a new subpart c to question 4, subpart c of question 4 as proposed has been redesignated as subpart d of question 4. The Commission also added a category of "relevant/not formally tested" to subpart d of question 4 in an effort to capture all possible opinions of the reporting CPO with respect to the listed market factors. The Commission believes that this modification will reduce the burden on reporting CPOs because fewer CPOs will need to provide detailed responses, and because those CPOs without existing quantitative models will not be required to build or acquire them to respond to the question. The Commission continues to believe that this question will provide valuable risk information to the Commission with respect to specific large pools.

The Commission is revising subpart a of question 5 to include the percentage of a pool's borrowings from U.S. and non-U.S. creditors that are not "financial institutions" as that term is defined in Form CPO-PQR, as separate line items. This revision parallels the structure of the question as proposed with respect to financial institutions.

The Commission is also amending question 9, regarding the duration of each large pool's fixed income instruments. This question, as amended, requires the CPO to report the duration, weighted average tenor, or 10-year equivalents of fixed income portfolio holdings, including asset-

backed securities. This is a difference from the question as proposed, which would have required all large CPOs to report duration. Through this revision, the Commission is giving large CPOs the option of instead reporting weighted average tenor or 10-year bond equivalents because the Commission understands that CPOs may use a wide range of metrics to measure interest rate sensitivity. The Commission expects that this revised approach will reduce the burden on CPOs because they will generally be able to utilize their existing practices when providing this information on the form.

6. Form CTA-PR

The Commission received several comments regarding the content of Form CTA-PR.[178] Most commenters urged the Commission to eliminate the form in its entirety.[179] Although the Commission does not believe that the complete elimination of Form CTA-PR is appropriate, it believes that Schedule B of the form contains redundant information that will already be collected through Form CPO-PQR. To reduce the burden on CTAs, the Commission will eliminate Schedule B. Instead, the Commission has decided to adopt only Schedule A of Form CTA-PR and will add a question asking the reporting CTA to identify the pools under its advisement so that the Commission can analyze the relationships among the various registrants to better assess sources of risk to the market and measure their potential reach. Because Form CTA-PR will be limited to demographic data, the Commission believes that it is appropriate for CTAs to file the form on an annual basis within 45 days of the end of the fiscal year. Therefore, the Commission has amended the text of § 4.27 to reflect this modification of the reporting obligations of CTAs.

7. Implementation

[178] See, e.g., IAA Letter; MFA II Letter; AIMA Letter; SIFMA Letter; and Fidelity Letter.
[179] Id.

The effective date for § 4.27 and Forms CPO-PQR and CTA-PR is July 2, 2012. The Commission is adopting a two-stage phase-in period for compliance with Form CPO-PQR filing requirements. The compliance date for § 4.27 is September 15, 2012 for any CPO having at least $5 billion in assets under management attributable to commodity pools as of the last day of the fiscal quarter most recently completed prior to September 15, 2012. Therefore, a CPO with $5 billion in commodity pool assets under management as of June 30, 2012, must file its first Form CPO-PQR within 60 days following September 30, 2012. Reporting CPOs must file all schedules of Form CPO-PQR.

For all other registered CPOs and all CTAs, the compliance date for § 4.27 is December 15, 2012. As a result, most advisers must file their first Form CPO-PQR or CTA-PR based on information as of December 31, 2012. This delay in compliance should allow sufficient time for CPOs and CTAs to develop systems for collecting the information required on the forms and prepare for filing. The Commission anticipates that this timeframe will also enable the NFA to have adequate time to program a system to accept the filings. The Commission has determined that the extension of the compliance dates is necessary because the rule and forms are being adopted later than expected.

G. Amendments to §§ 145.5 and 147.3: Confidential treatment of data collected on Forms CPO-PQR and CTA-PR.

As the Commission stated in the Proposal, the collection of certain proprietary information through Forms CPO-PQR and CTA-PR raises concerns regarding the protection of such information from public disclosure.[180] The Commission received two comments requesting that

[180] 76 FR 7976, 7982 (Feb. 12, 2011).

the Commission treat the disclosure of a pool's distribution channels as nonpublic information,[181] and numerous other comments urging the Commission to be exceedingly circumspect in ensuring the confidentiality of the information received as a result of the data collections.[182]

The Commission agrees that the distribution and marketing channels used by a CPO for its pools may be sensitive information that implicates other proprietary secrets, which, if revealed to the general public, could put the CPO at a competitive disadvantage. Accordingly, the Commission is amending §§ 145.5 and 147.3 to include question 9 of Schedule A of Form CPO-PQR as a nonpublic document.

Additionally, the Commission is amending §§ 145.5 and 147.3 to remove reference to question 13 in Schedule A of Form CPO-PQR because such question no longer exists due to amendments to that schedule. Similarly, the Commission will be designating question subparts (c) and (d) of question 2 of Form CTA-PR as nonpublic because it identifies the pools advised by the reporting CTA.

Therefore, as adopted, the parts of Form CPO-PQR that are designated nonpublic under parts 145 and 147 of the Commission regulations are:

- Schedule A: Question 2, subparts (b) and (d); Question 3, subparts (g) and (h); Question 9; Question 10, subparts (b), (c), (d), (e), and (g); Question 11; and Question 12.
- Schedule B: All.
- Schedule C: All; and
- Form CTA-PR: question 2, subparts c and d.

[181] See MFA II Letter and Seward & Kissel Letter.
[182] See Roundtable transcript. Commission staff also had numerous meetings with commenters that addressed this issue of confidentiality of information.

H. Conforming Amendments to Part 4.

As a result of the amendments adopted herein, the Commission must amend various provisions in part 4 of the Commission's regulations for purposes of making conforming changes. Specifically, the Commission is deleting references to repealed § 4.13(a)(4) in other sections of the Commission's regulations.

III. Related Matters.

A. Regulatory Flexibility Act.

The Regulatory Flexibility Act (RFA)[183] requires that agencies, in proposing rules, consider the impact of those rules on small businesses. The Commission has previously established certain definitions of "small entities" to be used by the Commission in evaluating the impact of its rules on such entities in accordance with the RFA.[184]

CPOs: The Commission has determined previously that registered CPOs are not small entities for the purpose of the RFA.[185] With respect to CPOs exempt from registration, the Commission has previously determined that a CPO is a small entity if it meets the criteria for exemption from registration under current Rule 4.13(a)(2).[186] Such CPOs will continue to qualify for either exemption or exclusion from registration and therefore will not be required to report on proposed Form CPO-PQR; however, they will have an annual notice filing obligation confirming their eligibility for exemption or exclusion from registration and reporting. The Commission estimates that the time required to complete this new requirement will be approximately 0.25 of an hour, which the Commission has concluded will not be a significant time expenditure. The Commission

[183] See 5 U.S.C. 601, et seq.
[184] 47 FR 18618 (April 30, 1982).
[185] See 47 FR 18618, 18619, Apr. 30, 1982.
[186] See 47 FR at 18619-20.

has determined that the proposed regulation will not create a significant economic impact on a substantial number of small entities.

CTAs: The Commission has previously decided to evaluate, within the context of a particular rule proposal, whether all or some CTAs should be considered to be small entities, and if so, to analyze the economic impact on them of any such rule.[187] Form CTA-PR is proposed to be required of all registered CTAs, which necessarily includes entities that would be considered small. The majority of the information requested on Form CTA-PR is information that is readily available to the CTA or readily calculable by the CTA, regardless of size. Therefore, the Commission estimates that the time required to complete the items contained in Form CTA-PR will be approximately 0.5 hours as it is comprised of only two questions, which solicit information that is expected to be readily available. The Commission has determined that Form CTA-PR will not create a significant economic impact on a substantial number of small entities. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules, will not have a significant impact on a substantial number of small entities.

The Commission did not receive any comments on its analysis of the application of the RFA to the instant part 4 amendments.

B. Paperwork Reduction Act.

This rulemaking contains information collection requirements. The Paperwork Reduction Act ("PRA") imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA.[188] An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information

[187] See 47 FR at 18620.
[188] See 44 U.S.C. 3501 et seq.

unless it displays a currently valid control number from the Office of Management and Budget ("OMB").

The Commission is amending Collection 3038-0023 to allow for an increase in response hours for the rulemaking resulting from the rescission of §§ 4.13(a)(4) and the modification of § 4.5. This amendment differs from that in the Proposal due to the Commission's decision to retain the exemption set forth in §4.13(a)(3). The Commission is amending Collection 3038-0005 to allow for an increase in response hours for the rulemaking associated with new and modified compliance obligations under part 4 of the Commission's regulations resulting from these revisions. The titles for these collections are "Part 3 – Registration" (OMB Control number 3038-0023) and "Part 4 – Commodity Pool Operators and Commodity Trading Advisors" (OMB Control number 3038-0005). Responses to this collection of information will be mandatory.

Both amendments differ from those set forth in the Proposal due to comments received asserting that, absent harmonization of the Commission's compliance regime for CPOs with that of the SEC for registered investment companies, entities operating registered investment companies that would be required to register with the Commission would not be able to comply with the Commission's regulations and would have to discontinue its activities involving commodity interests.[189] The Commission acknowledges that there are certain provisions of its compliance regime that conflict with that of the SEC and that it would not be possible to comply with both. For this reason, the Commission is considering issuing a notice of proposed rulemaking regarding the areas of potential harmonization between the Commission's compliance obligations and those of the SEC. Until such time as the harmonized compliance regime is adopted as final rules, the

[189] See, e.g., ICI Letter, Fidelity Letter, Dechert III Letter.

Commission will not be requiring compliance with the provisions of § 4.5 for registered investment companies. Therefore, the Commission is excluding § 4.5 compliance from the PRA burden calculation for these final rules, and is recalculating the information collection requirements associated with § 4.5 in the proposed harmonized compliance rules.

The Commission will protect proprietary information according to the Freedom of Information Act ("FOIA") and 17 CFR part 145, "Commission Records and Information." In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public "data and information that would separately disclose the business transactions or market position of any person and trade secrets or names of customers."[190] The Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974.[191]

1. Additional Information Provided by CPOs and CTAs.

a. OMB Control Number 3038-0023.

Part 3 of the Commission's regulations concern registration requirements. The Commission is amending existing Collection 3038-0023 to reflect the obligations associated with the registration of new entrants, i.e., CPOs that were previously exempt from registration under §§ 4.5 and 4.13(a)(4), that had not previously been required to register. The Commission is omitting those CPOs continuing to claim relief under § 4.13(a)(3), as that section will remain effective, and those CPOs that would be required to register under revised § 4.5, as those entities will not be able to register and comply with the Commission's compliance obligations until such time as the harmonization of its requirements with those of SEC is finalized. Because the registration

[190] See 7 U.S.C. 12.
[191] See 5 U.S.C. 552a.

requirements are in all respects the same as for current registrants, the collection has been amended only insofar as it concerns the increased estimated number of respondents and the corresponding estimated annual burden.

Accordingly, the Commission is amending existing Collection 3038-0023 to provide, in the aggregate:

Estimated number of respondents: 75,425

Annual responses by each respondent: 75,932

Estimated average hours per response: 0.09

Annual reporting burden: 6,833.9

In addition to the reporting burdens, each CPO or CTA not previously subject to registration will be obligated to submit a $200 registration fee, an $85 registration fee for each associated person, and a $15 fee for fingerprinting services for each associated person. Those entities that do not already provide certified annual reports will now incur public accounting costs as a result of the newly adopted rules requiring certification. Moreover, the Commission anticipates that reporting entities may hire external service providers, such as law firms or accounting firms, to prepare and submit some of the documents required both in Collection 3038-0023 and in Collection 3038-0005, which is accounted for below.

b. OMB Control Number 3038-0005.

Part 4 of the Commission's regulations concerns the operations of CTAs and CPOs, and the circumstances under which they may be exempted or excluded from registration. Under existing Collection 3038-0005 the estimated average time spent per response has not been altered; however, adjustments have been made to the collection to account for current information available from NFA concerning CPOs and CTAs registered or claiming exemptive relief under the

part 4 regulations, and the new burden expected under proposed § 4.27. The Commission estimates that a total of 300 entities annually will file the Notice of Exemption from CTA Registration under § 4.14(a)(8), with an estimated burden of 0.5 hours per notice filing. An estimated 253 entities will annually file 7,890 Notices of Exclusion from CPO Definition under § 4.5, with an estimated burden of 0.5 hours per notice filing. The rules also require certain reports by each entity registered as a CPO or CTA. These include certain disclosure documents, pool account statements and pool annual reports, and requests for extensions of the annual report deadline. The Commission estimates that 180 entities will prepare an average of 1.5 pool account statements as required under §4.22(a) an average of 9 times per year, with a per-response burden of 3.85 hours. The Commission estimates that these same 180 entities will prepare and file an average of 1.5 annual reports, with a burden of 9.58 hours per report. In addition, the Commission anticipates that 962 entities will file a request for a deadline extension for the annual report each year, with a burden of 0.5 hours per request.

These burden estimates, together with those associated with the increases necessary to account for the filing of forms CPO-PQR, PF, and CTA-PR discussed below, will result in an amendment to Collection 3038-0005 to provide, in the aggregate:

Estimated number of respondents: 43,168

Annual responses for all respondents: 61,868

Estimated average hours per response: 8.77

Annual reporting burden: 257,635.8

Proposed § 4.27 is expected to be the main reason for the increased burden under Collection 3038-0005.

The Commission has amended its burden estimates with respect to Form CPO-PQR to reflect the fact that dually registered entities that operate pools that are not private funds may report the activities for such funds on Form PF.[192] The Commission expects that any entity that is eligible to file form PF will file that form and not the form CPO-PQR, and has excluded from the estimates for form CPO-PQR those entities. As most of the burden associated with filing form PF for CPOs newly required to register with the Commission has been accounted for by the Commission in an information collection request associated with a rulemaking adopted jointly with the SEC, the amendment to Collection 3038-0005 accounts only for the burden of filing form PF by dually registered CPOs for pools that are not private funds as defined in the joint rulemaking.

i. Comments on § 4.27 Reporting Requirements

The Commission received numerous comments in response to proposed § 4.27, and in response has adopted a number of cost-mitigating measures. Several commenters questioned whether the data collection was necessary for the Commission's oversight of its registrants.[193] Others asserted that certain groups, such as registered investment companies or family offices, should be exempted from completing the data collection.[194] In the Commission's judgment, in order to fulfill the Commission's systemic-risk mitigation mandate, it is necessary to obtain

[192] Based on information that the Commission received from registrants on their annual financial report filings, the Commission determined that 1/3 of all pools reporting to the Commission in 2009 reported gains or losses from securities or a combination of securities and futures. Based on the provisions of Form PF, which permits filers of the form to file with respect to commodity pools that are not private funds, the Commission anticipates that all entities entitled to file Form PF for their commodity pools will do so, as it is less burdensome on the filer. Therefore, the Commission has included burden estimates for CPOs to file Form PF for their commodity pools that are not private funds, which is an incremental increase over the burden imposed by the obligation to file Form PF for the entity's private funds.

[193] See Fidelity Letter; and AIMA Letter.

[194] See ICI Letter; AIMA Letter; and K&L Letter.

information from the full universe of registrants to fully assess the activities of CPOs and CTAs in the derivatives markets.

With respect to the assertion that registered investment companies should not be required to file form CPO-PQR, the Commission believes that it is important to collect the data in form CPO-PQR from registered investment companies whose activities require CPO registration to assess the risk posed by such investment vehicles in the derivatives markets and the financial system generally. In this respect, the Commission intends to require the same information from the CPOs of registered investment companies as it is requiring from other registered CPOs. Additionally, the Commission notes that to the extent that the entity registered as the CPO for the registered investment company is registered as an investment adviser and is required to file Form PF with the SEC, the activities of the registered investment company may be reported on Form PF rather than form CPO-PQR.

The Commission further believes that the same reasoning applies with respect to the collection of data from family offices. To enable the Commission to evaluate a potential family offices exemption following the collection and analysis of data regarding their activities, the Commission believes that it is essential that family offices remain subject to the data collection requirements.

One commenter recommended that the Commission clarify the filing obligations for CPOs and CTAs that are required to file form PF with the SEC and streamline the reporting

obligations.[195] Another commenter argued that a very large private fund that has a limited amount of derivatives trading should not be subject to schedule C of form CPO-PQR.[196]

As stated in the Proposal, CPOs that are dually registered with the SEC and that file form PF must still file schedule A, containing basic demographic information, with the Commission, and CTAs must still file form CTA-PR. The Commission intends to adopt § 4.27 as proposed and permit dual registrants to file form PF with the SEC in lieu of completing schedules B and/or C of form CPO-PQR.

However, the Commission did not intend to require very large dual registrants to file anything more than the general identifying information required on schedule A with the Commission, and neither § 4.27 nor the forms require dual registrants to file schedules B or C if they are filing form PF. Similarly, the Commission is not adopting schedule B from form CTA-PR, and therefore, will be limiting the information collected from registered CTAs to demographic data and the names of the pools advised by the CTA. These measures will mitigate costs to market participants by limiting the number of registrants that must file these forms with the Commission.

One commenter questioned whether the information collected on forms CTA-PR and CPO-PQR will provide the Commission with real-time data that will enable it to have an accurate and timely picture of a CTA's activities and operating status.[197] Another commenter questioned whether the Commission possessed the staffing and financial resources necessary to meaningfully use such data as part of its oversight.[198] The Commission recognizes the limitations of the data

[195] See Fidelity Letter.

[196] See AIMA Letter; see also, SIFMA Letter; and Fidelity Letter.

[197] See Barnard Letter.

[198] See Dechert Letter.

collection instruments with respect to the timeliness of the information requested. The Commission believes, however, that the forms strike the appropriate balance between the time needed to compile complex data and the Commission's need for timely information. Information that is less than real-time is nevertheless useful in assisting the Commission in overseeing registrants as it will provide additional information upon which the Commission can base future program adjustments to ensure efficient deployment of the Commission's resources.

As an offset to the costs otherwise associated with additional reporting, the Commission intends for the data to be collected from registrants in an electronic format. The Commission anticipates that electronic data filing will be less time-intensive and should lower compliance costs for participants, as well as processing costs for the Commission. Moreover, the Commission believes that, over time, participants will develop certain efficiencies in the filing of their annual CPO-PQR and CTA-PR forms, allowing costs to continue to decrease over time. Further, the Commission recognizes that the resources available to it are variable. As a further cost-mitigating measure, the Commission will leverage any limits on its resources through its coordination with NFA to accomplish the analysis necessary to make full use of the data collected from Commission registrants.

The Commission received several comments regarding the appropriate reporting thresholds for the various schedules of form CPO-PQR.[199] The commenters stated that $150 million in assets under management was too low of a threshold for entities to be categorized as mid-sized and required to file schedule B. Rather, the commenters urged the Commission to increase the

[199] See AIMA Letter; MFA II Letter; Seward Letter. See also, AIMA II Letter.

threshold to $500 million in assets under management.[200] These commenters also suggested that the Commission increase the threshold for large CPOs to $5 billion in assets under management.[201]

The Commission believes that $150 million in assets under management is still the appropriate threshold for mid-sized CPOs. The Commission will retain this threshold because it is consistent with the threshold for advisers filing section 1 of form PF, which is substantively similar to schedule B of form CPO-PQR, and it will ensure comparable treatment of entities of similar magnitude. In addition, the Commission has decided not to increase the large CPO threshold to $5 billion. The Commission has decided, however, to increase the threshold for large CPOs from $1 billion to $1.5 billion. The Commission anticipates that increasing the threshold to $1.5 billion will lower costs by reducing the number of CPOs required to file schedule C of form CPO-PQR, while still capturing data concerning a substantial portion of the assets under management by registered CPOs. The Commission believes that increasing the threshold beyond $1.5 billion, however, could limit the Commission's access to information necessary to oversee entities that could pose a risk to the derivatives markets or the financial system as a whole.

In response to comments, the Commission has also determined to mitigate costs and promote efficiency by modifying the frequency of reporting for filers of form CPO-PQR. As adopted, all CPOs other than large CPOs will be required to file schedule A on an annual basis; mid-size CPOs will be required to file schedule B on an annual basis; and large CPOs will be required to file schedules A, B, and C on a quarterly basis.

The Commission received several comments asserting that the 15-day period for reporting was not sufficient to permit reporting CPOs to complete and file the form and all suggested

[200] See AIMA Letter.

[201] See AIMA Letter; MFA II Letter; and Seward Letter.

extending the period to 30 or 45 days.[202] The Commission agrees that reporting CPOs will need additional time in which to submit the various schedules of form CPO-PQR. In a further effort to reduce costs to participants, all CPOs other than large CPOs will be required to file schedule A within 90 days of the end of the calendar year. This time period was chosen for efficiency and cost mitigation inasmuch as it coincides with the annual questionnaire required by NFA of its entire population of member CPOs and with the vast majority of annual report filings for commodity pools. Moreover, because the Commission has transferred the pool position information from schedule A to schedule B, the Commission believes that CPOs should be able to comply with filing basic demographic data within 90 days.

For schedule B, mid-sized CPOs are required to submit that schedule within 90 days; the Commission believes this is an adequate time period for compiling and reporting that schedule. The Commission notes that CPOs are generally required to file annual reports for their pools within 90 days of their fiscal year end, most of which coincide with the calendar year end. The Commission believes that the alignment of pools' fiscal years with the calendar year end should facilitate the preparation of schedule B and reduce the burden imposed on mid-size CPOs because some of the information required will be similar to that included in a pool's annual financial statements.

With respect to the quarterly reporting by large CPOs on schedules A, B, and C, the Commission believes that 60 days is a sufficient amount of time to complete those schedules for large CPOs. The Commission notes that the entities required to file on a quarterly basis have a significant amount of assets under management, and as such, the Commission anticipates that such

[202] See NFA Letter; Seward Letter; and AIMA Letter.

entities routinely generate the type of information requested on schedules B and C as part of their internal governance. Accordingly, the Commission will require large CPOs to file schedules A, B, and C within 60 days following the end of the reporting period as defined in form CPO-PQR.

The Commission received several comments regarding the content of form CTA-PR.[203] Most commenters urged the Commission to eliminate the form in its entirety.[204] The Commission does not believe that the complete elimination of form CTA-PR is appropriate; however, the Commission agrees that schedule B of the form contains redundant information that will already be collected through form CPO-PQR. Accordingly, the Commission has decided to adopt only schedule A of form CTA-PR. In so doing, the Commission believes the burden on CTAs should be significantly reduced. Because form CTA-PR will be limited to demographic data, the Commission believes that it is appropriate for CTAs to file the form on an annual basis within 45 days of the end of the fiscal year.

Finally, because the regulations have been modified to allow dually registered entities to file only form PF (plus the first schedule A of form CPO-PQR) for all of their commodity pools, even those that are not "private funds," the Commission expects that such entities should not be burdened by the costs of dual registration and dual filing.

ii. Information collection estimates for forms CPO-PQR, PF, and CTA-PR

The Commission expects the following burden with respect to the various schedules of Forms CPO-PQR, PF, and CTA-PR:

Form CPO-PQR: Schedule A:

Estimated number of respondents (excluding large CPOs): 3,890

[203] See e.g., IAA Letter; MFA II Letter; AIMA Letter; SIFMA Letter; and Fidelity Letter.

[204] Id.

Annual responses by each respondent: 1

Estimated average hours per response: 6

Annual reporting burden: 23,340

Estimated number of respondents (large CPOs): 170

Annual responses by each respondent: 4

Estimated average hours per response: 6

Annual reporting burden: 4,080

Form CPO-PQR: Schedule B:

Estimated number of respondents (mid size CPOs): 440

Annual responses by each respondent: 1

Estimated average hours per response: 4

Annual reporting burden: 1,760

Estimated number of respondents (large CPOs): 170

Annual responses by each respondent: 4

Estimated average hours per response: 4

Annual reporting burden: 2,720

Form CPO-PQR: Schedule C:

Estimated number of respondents: 170

Annual responses by each respondent: 4

Estimated average hours per response: 18

Annual reporting burden: 12,240

Form PF (non-large CPOs):

Estimated number of respondents: 220

Annual responses by each respondent: 1

Estimated average hours per response: 4

Annual reporting burden: 880

Form PF (large CPOs):

Estimated number of respondents: 90

Annual responses by each respondent: 4

Estimated average hours per response: 18

Annual reporting burden: 6,480

Form CTA-PR:

Estimated number of respondents: 450

Annual responses by each respondent: 1

Estimated average hours per response: 0.5

Annual reporting burden: 225

C. Considerations of Costs and Benefits

The Commission has historically exercised its authority to exempt certain categories of entity from the CPO and CTA registration requirement set forth in Section 4m(1) of the CEA, which states that it is otherwise "unlawful for any commodity trading advisor or commodity pool operator, unless registered under this Act" to conduct business in interstate commerce.[205] Exempted entities have included certain investment companies registered with the SEC pursuant to the Investment Company Act of 1940, and certain entities whose only participants are "qualified

[205] 7 U.S.C. §6m.

eligible persons."[206] This system of exemptions was appropriate because such entities engaged in relatively little derivatives trading, and dealt exclusively with qualified eligible persons, who are considered to possess the resources and expertise to manage their risk exposure.

In the Commission's judgment, changed circumstances warrant revisions to these rules. The Commission is aware, for example, of increased derivatives trading activities by entities that have previously been exempted from registration with the Commission, such that entities now offering services substantially identical to those of registered entities are not subject to the same regulatory oversight. Meanwhile, the Dodd-Frank Act has given the Commission a more robust mandate to manage systemic risk and to ensure safe trading practices by entities involved in the derivatives markets, including qualified eligible persons and other participants in commodity pools. Yet, while the Commission must execute this mandate, there currently is no source of reliable information regarding the general use of derivatives by registered investment companies.

The Commission, therefore, is adopting a new registration and data collection regime for CPOs and CTAs that is consistent with the data collection required under the Dodd-Frank Act. In these final rules, the adopted amendments to part 4 of the Commission's regulations will do the following: (A) rescind the exemption from CPO registration provided in § 4.13(a)(4) of the Commission's regulations; (B) rescind relief from CTA registration for those CTAs who advise pools with relief under § 4.13(a)(4); (C) rescind relief from the certification requirement for annual reports provided to operators of certain pools only offered to qualified eligible persons ("QEPs") under § 4.7(b)(3); (D) modify the criteria for claiming relief under § 4.5 of the Commission's regulations; (E) require the annual filing of notices claiming exemptive relief under § 4.5, § 4.13,

[206] 17 CFR §§ 4.5(a)(1), 4.13(a)(4).

and § 4.14 of the Commission's regulations; and (F) require additional risk disclosures for CPOs and CTAs regarding swap transactions and, certain conforming amendments. By these amendments, the Commission seeks to eliminate informational "blind spots," which will benefit all investors and market participants by enhancing the Commission's ability to form and frame effective policies and procedures.

Section 15(a)[207] of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing an order. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. To the extent that these new regulations reflect the statutory requirements of the Dodd-Frank Act, they will not create costs and benefits beyond those resulting from Congress's statutory mandates in the Dodd-Frank Act. However, to the extent that the new regulations reflect the Commission's own determinations regarding implementation of the Dodd-Frank Act's provisions, such Commission determinations may result in other costs and benefits. It is these other costs and benefits resulting from the Commission's own determinations pursuant to and in accordance with the Dodd-Frank Act that the Commission considers with respect to the Section 15(a) factors.

The Commission has quantified estimated costs and benefits where it is reasonably practicable to do so. The Commission notes that, unless otherwise specified, all costs discussed herein are estimates based on the Commission's knowledge of the operations and

[207] 7 U.S.C. 19(a).

registration statuses of CPOs and CTAs. Moreover, the Commission is obligated to estimate the burden of and provide supporting statements for any collections of information it seeks to establish under considerations contained in the PRA, 44 U.S.C. 3501 et seq., and to seek approval of those requirements from the OMB. Therefore, the estimated burden and support for the collections of information in this this rulemaking, as well as the consideration of comments thereto, are discussed in the PRA section of this rulemaking and the information collection requests filed with OMB as required by that statute. All estimates are based on average costs; actual costs may vary depending on the entity's individual business model and compliance procedures.

The Commission is sensitive to costs incurred by market participants and has attempted in a variety of ways to minimize burdens on affected entities. These include the Commission's efforts to harmonize its compliance requirements with those of the SEC, including through specific harmonizing provisions in the joint SEC-CFTC rule for dually registered investment advisers, as well as through tailoring of the current amendments.[208] A number of other cost-mitigation measures are discussed later in this section.

In its Proposal, the Commission invited commenters to "to submit any data and other information that they may have quantifying or qualifying the costs and benefits of this proposed rule with their comment letters."[209] Many comments addressed the costs and benefits of the proposed rule in qualitative terms. These comments are considered below.

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[208] See Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, 76 FR 71128 (Nov. 16, 2011).

[209] 76 FR 7976, 7989 (Feb. 11, 2011).

In the following discussion, the Commission sets forth its own assessment of the benefits and costs of the amendments; addresses relevant comments on the Proposal and alternatives to the Proposal submitted by commenters; and evaluates the benefits and costs in light of the five broad areas of market and public concern set forth in Section 15(a) of the CEA. The analysis begins by addressing general comments related to cost-benefit analysis in the context of the Proposal as a whole, and then proceeds to examine the specific issues according to the following three categories of regulation contained within the Proposal: (1) registration (including changes to § 4.5, § 4.13(a), and § 4.14); (2) data collection (including the adoption of forms CPO-PQR and CTA-PR); and (3) complementary amending provisions (including changes to § 4.7, § 4.24, § 4.34, and parts 145 and 147).

1. General Comments

Several commenters claimed that the Commission did not provide a sufficient consideration of costs and benefits in the Notice of Proposed Rulemaking.[210] One commenter noted that the cost-benefit considerations focused on benefits that are already provided by other federal securities laws, making the regulations duplicative.[211] Another commenter asserted that until other rules, such as the further definition of "swaps," as well as capital and margin requirements, have been finalized, it is not possible to determine the costs and benefits of these rules.[212] Other commenters suggested there be another roundtable meeting to discuss the proposed rules.[213]

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[210] See SIFMA Letter; USCC Letter; Reed Smith Letter; NFA Letter; Invesco Letter; Dechert II Letter; and ICI Letter.

[211] See ICI Letter.

[212] See Dechert II Letter.

[213] See Vanguard Letter; MFA Letter.

In response to these comments, the Commission has further considered costs and benefits as they relate to the final rules. As explained below in the discussion concerning dual SEC and Commission registrants, the Commission believes that the benefits provided by these rules are supplementary to, and not duplicative or redundant of, benefits provided by the federal securities laws. The Commission does not believe that the adoption of these regulations should be postponed until after other regulations are finalized and believes that the costs and benefits are sufficiently clear at this point and that delay is not justified.[214] In addition, the Commission has no reason to believe that another roundtable meeting would yield information substantially different from that gleaned from prior roundtables, comment letters, and meetings with industry representatives.

The Commission has determined that these amendments will create additional compliance costs for affected participants. These costs include, but may not be limited to, the cost to prepare and file new forms CPO-PQR and CTA-PR; the cost to file an annual notice to claim exemptive relief under §§ 4.5, 4.13, and 4.14; the cost of preparing, certifying, and submitting annual reports as required for registrants; the cost of preparing required disclosure documents; the cost of preparing and distributing account statements on a periodic basis to participants; the cost of keeping certain records as required; and the cost of registering as a CPO or CTA. These costs each relate to collections of information subject to PRA compliance, and therefore have been accounted for in the PRA section of this rulemaking and the information collection requests filed with OMB as required by that statute.

[214] As noted above, however, the Commission agrees that it should not implement the inclusion of swaps within the threshold test prior to the effective date of such relevant final rules. Therefore, it is the Commission's intention to delay the effective date of the inclusion of swaps into the threshold calculation until 60 days after the final rules regarding the definition of "swap" and the delineation of the margin requirement for such instruments are effective.

Notably, many of the benefits associated with the requirements adopted or amended in these regulations are recognized not only by the Commission in its mission to protect derivatives markets and the participants in them but also by the industry. Several "best practices" manuals highlight the benefits of being registered with the Commission, preparing and disseminating risk disclosure documents, confirming receipt of disclosure documents, and ensuring independent audit of financial statements and annual reports.[215] These benefits include increased consumer confidence in offered pools and funds as well as increased internal risk management structures.

2. Regulations Regarding Registration Requirements for CPOs and CTAs

As discussed above, the amendments to the registration provisions under part 4 include rescissions of the exemptions for entities functioning as commodity pools with only "qualified eligible persons" as participants and the exclusion of registered investment companies under the Investment Company Act of 1940, unless those investment companies fall below a certain threshold level of derivatives investment activity. With respect to those entities that will continue to claim exemption or exclusion from registration as CPOs or CTAs under the rules, the amendments will also require annual reaffirmance of those claims of exemption or exclusion.

a. Benefits of Registration Provisions

As discussed above in II.A.1, the Commission believes that registration provides two significant interrelated benefits. First, registration allows the Commission to ensure that entities with greater than a de minimis level of participation in the derivatives markets meet minimum standards of fitness and competency. Second, registration provides the Commission and members

[215] See, e.g. "Sound Practices for Hedge Fund Managers." Managed Funds Association (MFA).Washington D.C., 2007.; "Principles and Best Practices for the Hedge Fund Industry." Investors Committee Report to the President's Working Group on Financial Markets, Washington D.C., 2008.; and "Best Practices for the Hedge Fund Industry." Asset Managers Committee Report to the President's Working Group on Financial Markets, Washington D.C., 2009.

of the public with a direct means to address wrongful conduct by participants in the derivatives markets. The Commission has direct authority to take punitive and/or remedial action against registered entities for violations of the CEA or of the Commission's regulations. The Commission also has the ability to deny or revoke registration, thereby prohibiting an unfit individual or entity from serving as an intermediary in the industry. Members of the public also may access the Commission's reparations program to seek redress for wrongful conduct by a Commission registrant.

The Commission believes that the registration procedures enacted as part of its regulatory regime upgrade the overall quality of market participants, which, in turn, strengthens the derivatives industry by minimizing lost business due to customer dissatisfaction and by reducing litigation arising from acts of market participants. Therefore, the Commission believes that its registration requirements further critical regulatory objectives and serve important public policy goals.

By expanding the Commission's regulatory oversight of entities performing the functions of CPOs and CTAs, the Commission believes that the final rules related to registration will help to ensure that such entities meet basic standards of competency and fitness, which in turn will provide a greater level of protection to market participants. Ensuring that CPOs and CTAs are qualified in the first instance—as opposed to relying solely on after-the-fact enforcement actions to deter and remedy misconduct—should reduce such instances of misconduct and resulting litigation, and thereby promote overall market confidence. Therefore, the Commission believes that its registration requirements are integral to its regulatory objectives and are in the public interest.

With specific respect to the annual reaffirmance requirement, this amendment will promote transparency regarding the number of entities either exempt or excluded from the Commission's registration and compliance programs. One primary purpose of the Dodd Frank Act is the promotion of transparency in the financial system, particularly in the derivatives market. This requirement is consistent with and will further that purpose. Finally, the annual notice requirement will enable the Commission to determine whether exemptions and exclusions should be modified, repealed, or maintained as part of the Commission's ongoing assessment of its regulatory scheme.

These benefits – enhancing the quality of entities operating within the market, and the screening of unfit participants from the markets—are substantial, even if unquantifiable. Through registration, the Commission will be better able to protect the public and markets from unfit persons and conduct that may threaten the integrity of the markets subject to its jurisdiction.

b. Costs of Registration Provisions

Because of the amendments to part 4 as adopted here, the Commission recognizes that some participants who previously were excluded or exempted from registering as a CPO or CTA will now be required to register with the Commission through NFA. In addition to costs associated with registration accounted for under the PRA, which one commenter said would "vary significantly depending on a range of factors, including the number of employees who will need to pass examinations, the number of funds advised, investment strategy and complexity, existing IT systems, and whether or not an adviser is already registered or authorized and subject to a different regulatory regime,"[216] the commenter estimated ongoing costs to be in the range of $150,000 to $250,000 per year, a substantial part of which would be made up of additional compliance

[216] See AIMA II Letter.

personnel, information technology development and legal/accounting advice that will be required, and again vary significantly depending on the factors mentioned above.[217] The Commission presents these estimates for the consideration of affected entities, reiterating the high variability of costs depending on the factors enumerated by the commenter. This variability is one reason the Commission presented its own estimates of costs on a per-requirement basis; affected entities should be aware that the total cost of registration and compliance will most likely be the sum of any number of the estimates presented in this section and under the PRA. In addition to the information collection costs addressed by the Commission under the PRA, entities that will be required to register with the Commission also will become subject to NFA rules and to NFA audit procedures. NFA assesses annual membership dues on CPOs and CTAs, currently $750, and charges $90 for the National Commodity Futures Examination (NCFE) or Series 3 Examination for each AP. The Commission understands that NFA audits CPOs and CTAs, on average, every two to three years, though the frequency of audit depends greatly on individual risk factors, and NFA generally conducts an audit within the first year following registration of an entity.[218] The cost of such an audit may be incurred by the CPO or CTA through an "audit fee" imposed by NFA; however, the audit fee varies greatly by individual entity and individual audit and thus is difficult to quantify on any sort of aggregated basis. Notwithstanding the difficulty of quantifying such a burden, the Commission notes this cost will most likely arise in the first year of registration and on average every few years thereafter, and entities should expect such a fee to be incurred.

c. Comments Regarding Registration Provisions

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[217] Id.

[218] For more information on audit procedures, visit the NFA website, currently at http://www.nfa.futures.org/NFA-compliance/NFA-general-compliance-issues/nfa-audits.HTML.

1. § 4.5 Amendments

Commenters who opposed the changes to § 4.5 claimed that requiring registered investment companies to register and comply with the Commission's regulatory regime would provide no benefit, because such entities are already subject to comprehensive regulation by the SEC.[219] The Commission disagrees.

While the Commission and the SEC share many of the same regulatory objectives, including protecting market users and the public from fraud and manipulation, the Commission administers the CEA to foster open, competitive, and financially sound commodity and derivatives markets. The Commission's programs are structured and its resources deployed to meet the needs of the markets it regulates. In light of this Congressional mandate, it is the Commission's view that entities engaging in more than a de minimis amount of derivatives trading should be required to register with the Commission. The alternative approaches suggested by commenters would, as discussed above, detract from the benefits of registration.

As also discussed above, the Commission is aware that currently unregistered entities are offering services substantially identical to those of registered CPOs. Several commenters also asserted that modifying § 4.5 would result in a significant burden on entities required to register with the Commission without any meaningful benefit to the Commission.[220] The Commission recognizes that significant burdens may arise from the modifications to § 4.5; however, the Commission believes, as discussed throughout this release, that entities that are offering services

[219] See, e.g., ICI Letter.

[220] See ICI Letter; Vanguard Letter; Reed Smith Letter; AllianceBernstein Letter;USAA Letter; PMC Letter; IAA Letter; Dechert II Letter; Janus Letter; STA Letter; Invesco Letter; and Equinox Letter.

substantially identical to those of a registered CPO should be subject to substantially identical regulatory obligations.

Nevertheless, the Commission has not eliminated altogether the exemption available under § 4.5. Where an entity's trading does not exceed five percent of the liquidation value of its portfolio, that entity will remain exempt from registration. In the Commission's judgment, trading exceeding five percent of the liquidation value of a portfolio evidences a significant exposure to the derivatives markets.[221] This threshold was adopted by the Commission in its earlier enactment of § 4.13(a)(3).[222] In promulgating that exemption for de minimis activity, the Commission determined that five percent is an appropriate threshold beyond which oversight by the Commission is warranted.[223] Because current data and information does not allow the Commission to evaluate the difference in market impact at various threshold levels[224] the Commission believes it is prudent to maintain the current threshold level. Further, as discussed above, no facts have been put before the Commission that would warrant deviation from the five-percent threshold, including data respecting the costs and benefits of the same. The Commission also received numerous comments on the proposed addition of a trading threshold to the exclusion

[221] 76 FR 7976, 7985 (Feb. 12, 2011) (stating that "[the] Commission believes that it is possible for a commodity pool to have a portfolio that is sizeable enough that even if just five percent of the pool's portfolio were committed to margin for futures, the pool's portfolio could be so significant that the commodity pool would constitute a major participant in the futures market").

[222] 17 CFR 4.13(a)(3).

[223] 68 FR 47221, 47225 (Aug. 8, 2003).

[224] The Commission currently only has information on the positions held by CPOs in futures markets, i.e., those entities already registered as CPOs, as opposed to those excluded from the definition of CPO under § 4.5. The Commission does not have access to information on the total liquidation value of funds operated by registered CPOs or those operated by excluded CPOs, values that are needed to determine the universe of entities affected by one particular percentage threshold versus another. These data limitations are one reason why the Commission is pursuing additional data collection initiatives under these final rules.

under § 4.5.[225] Some commenters stated that a five percent de minimis threshold is too low in light of the Commission's determination to include swaps within the measured activities. Although these commenters presented alternatives to this five percent threshold (some said twenty percent would be more reasonable, for example) the Commission believes, as stated in the Proposal, that trading exceeding five percent of the liquidation value of a portfolio evidences a significant exposure to the derivatives markets.[226] Moreover, in its adoption of the exemption under § 4.13(a)(3),[227] the Commission previously determined that five percent is an appropriate threshold to determine whether an entity warrants oversight by the Commission.[228] Current data and information does not allow the Commission to evaluate the difference in market impact at various threshold levels;[229] thus, the Commission believes it is prudent to maintain the current threshold level. Commenters also recommended that the Commission exclude from the threshold calculation various instruments including broad-based stock index futures, security futures generally, or financial futures contracts as a whole.[230] As discussed above, the Commission does not believe that a meaningful distinction can be drawn between those security or financial futures and other

[225] See Invesco Letter; ICI Letter; Vanguard Letter; Reed Smith Letter; AllianceBernstein Letter; AII Letter; STA Letter; Janus Letter; PMC Letter; USAA Letter; Fidelity Letter; SIFMA Letter; Dechert III Letter; Rydex Letter; USCC Letter; Sidley Letter; NFA Letter; Campbell Letter; AQR Letter; Steben Letter; ICI II Letter; and AII Letter.

[226] 76 FR 7976, 7985 (Feb. 12, 2011) (stating that "[the] Commission believes that it is possible for a commodity pool to have a portfolio that is sizeable enough that even if just five percent of the pool's portfolio were committed to margin for futures, the pool's portfolio could be so significant that the commodity pool would constitute a major participant in the futures market").

[227] 17 CFR 4.13(a)(3).

[228] 68 FR 47221, 47225 (Aug. 8, 2003).

[229] The Commission currently only has information on the positions held by CPOs in futures markets, i.e., those entities already registered as CPOs, as opposed to those excluded from the definition of CPO under § 4.5. The Commission does not have access to information on the total liquidation value of funds operated by registered CPOs or those operated by excluded CPOs, values that are needed to determine the universe of entities affected by one particular percentage threshold versus another. These data limitations are one reason why the Commission is pursuing additional data collection initiatives under these final rules.

[230] See Rydex Letter; Invesco Letter; and ICI Letter.

categories of futures for the purposes of registration; thus, the Commission does not believe that exempting any of these instruments from the threshold calculation is appropriate.

Several panelists at the Roundtable suggested that, instead of a trading threshold that is based on a percentage of margin, that the Commission should focus solely on entities that offer "actively managed futures" strategies.[231] As discussed in section II.A.2, the Commission does not find it appropriate to establish a differentiation between "active" and "passive" derivative investments because, in addition to other reasons,[232] establishing such differentiation would introduce an element of subjectivity to an otherwise objective standard and make the threshold more difficult to interpret, apply, and enforce.

One commenter suggested that the Commission should consider the adoption of an alternative test that would be identical to the aggregate net notional value test that is currently available under § 4.13(a)(3)(ii)(B).[233] Section 4.13(a)(3)(ii)(B) provides that an entity can claim exemption from registration if the net notional value of its fund's derivatives trading does not exceed one hundred percent of the liquidation value of the fund's portfolio.[234]

Conversely, several panelists at the Roundtable opposed such a test, stating that it was not a reliable means to measure an entity's exposure in the market.[235] As stated previously herein, the Commission believes that the adoption of an alternative net notional test will provide consistent

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[231] See Transcript of CFTC Staff Roundtable Discussion on Proposed Changes to Registration and Compliance Regime for Commodity Pool Operators and Commodity Trading Advisors ("Roundtable Transcript"), at 19, 25, 30, 76-77, 87-90, available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission27_070611-trans.pdf.

[232] Additional reasons for not accepting this alternative are discussed in section II.A.2 of this release.

[233] See Dechert III Letter.

[234] 17 CFR 4.13(a)(3)(ii)(B).

[235] See Roundtable Transcript at 69-71.

standards for relief from registration as a CPO for entities whose portfolios only contain a limited amount of derivatives positions and will afford registered investment companies with additional flexibility in determining eligibility for exclusion. Therefore, the Commission will adopt an alternative net notional test, consistent with that set forth in § 4.13(a)(3)(ii)(B) as amended herein, for registered investment companies claiming exclusion from the definition of CPO under §4.5..

The Commission also received several comments supporting both the imposition of a trading threshold in general and the five percent threshold specifically.[236] At least one commenter suggested, however, that the Commission consider requiring registered investment companies that exceed the threshold to register, but not subjecting them to the Commission's compliance regime beyond requiring them to be subject to the examination of their books and records, and examination by NFA.[237] In effect, this commenter requested that the Commission subject such registrant to "notice registration." The Commission believes that adopting the approach proposed by the commenter would not materially change the information that the Commission would receive regarding the activities of registered investment companies in the derivatives markets, which is one of the Commission's purposes in amending § 4.5. Moreover, a type of notice registration would not provide the Commission with any real means for engaging in consistent ongoing oversight. Notwithstanding such notice registration, the Commission would still be deemed to have regulatory responsibility for the activities of these registrants. In the Commission's view, notice registration does not equate to an appropriate level of oversight. For that reason, the Commission has determined not to adopt the alternative proposed by the commenter. The Commission is

[236] See NFA Letter, Campbell Letter, AQR Letter, and Steben Letter.

[237] See AQR Letter.

adopting the amendment to § 4.5 regarding the trading threshold without modification for the reasons stated herein and those previously discussed in the Proposal.

2. §§ 4.13(a)(3) and (a)(4) Rescissions

In addition to the comments that the Commission received regarding the specific parts of the Proposal rescinding §§ 4.13(a)(3) and (a)(4), the Commission received numerous comments regarding the proposed rescissions generally.[238] Broadly, the comments opposed the rescission of the provisions. In the Proposal, the Commission proposed rescinding the "de minimis" exemption in § 4.13(a)(3). The Commission received ten comments specifically on this aspect of the Proposal, which consistently urged the Commission to retain a de minimis exemption. As discussed above in section II.C.2, the Commission, after consideration of the comments and the Commission's stated rationale for proposing to rescind the exemption in § 4.13(a)(3), has determined to retain the "de minimis" exemption currently set forth in that section without modification.

Several commenters asserted that rescission was not necessary because the Commission has the means to obtain any needed information from exempt CPOs through its large trader reporting requirements and its special call authority.[239] Although the Commission has those means, neither of those rules were intended to provide the kind of data requested of registered entities on forms CPO-PQR or CTA-PR with the regularity proposed under § 4.27.

Another commenter asserted that the compliance and regulatory obligations under the Commission's rules are burdensome for private businesses and would unnecessarily distract

[238] See NYSBA Letter; Skadden Letter; MFA Letter; Katten Letter; Fidelity Letter; Dechert Letter; AIMA Letter; AIMA II Letter; IAA Letter; SIFMA Letter; HedgeOp Letter; PIC Letter; and Seward Letter.

[239] See Skadden Letter; Katten Letter; and MFA Letter.

entities from their primary focus of managing client assets.[240] The Commission believes that regulation is necessary to ensure a well functioning market and to provide protection of those clients. The Commission further believes that the compliance regime that the Commission has adopted strikes the appropriate balance between limiting the burden placed on registrants and enabling the Commission to carry out its duties under the Act.

In the Proposal, the Commission also proposed to rescind the exemption in § 4.13(a)(4) for operators of pools that are offered only to individuals and entities that satisfy the qualified eligible person standard in § 4.7 or the accredited investor standard under the SEC's Regulation D.[241] Several commenters argued that the Commission should consider retaining the exemption in § 4.13(a)(4) for funds that do not directly invest in commodity interests, but do so through a fund of funds structure, and who are advised by an SEC registered investment adviser. The Commission has not developed a comprehensive view regarding the role of funds of funds in the derivatives markets, in part, due to a lack of data regarding their investment activities. The Commission, therefore, believes that it is prudent to withhold consideration of a fund of funds exemption until the Commission has received data regarding such firms on forms CPO-PQR and/or CTA-PR, as applicable, to enable the Commission to better assess the universe of firms that may be appropriate to include within the exemption, should the Commission decide to adopt one. Therefore, the Commission declines to adopt the commenter's alternative to provide an exemption for funds of funds at this time.

One commenter argued that rescission is not necessary because any fund that seeks to attract qualified eligible persons is already required to maintain oversight and controls that exceed

[240] See MFA Letter; Seward Letter; and Katten Letter.

those mandated by part 4 of the Commission's regulations such that any regulation imposed would be duplicative and unnecessarily burdensome.[242] The commenter primarily focused on the significant level of controls that the fund operator implements independent of regulation. The Commission believes that, contrary to the commenter's arguments as to the import of that fact, such controls and internal oversight should make compliance with the Commission's regulatory regime easier and cheaper rather than more burdensome. If the information required to be disclosed under the Commission's regulations is to a large extent already being disclosed by the firm, the Commission anticipates that this would limit the costs of compliance to those costs directly involved with formatting such information as required by the Commission's disclosure and reporting rules. The Commission adopts the rescission of § 4.13(a)(4) as proposed.

The Commission has also elected to mitigate costs by phasing in gradually the rescission of § 4.13(a)(4). As discussed in section II.C.5, in response to certain comments, the Commission will implement the rescission of § 4.13(a)(4) for all entities currently claiming exemptive relief thereunder on December 31, 2012, but the rescission will be implemented for all other CPOs upon the effective date of this final rulemaking. This timeline reflects the Commission's belief that entities currently claiming relief under § 4.13(a)(4) should be capable of becoming registered and complying with the Commission's regulations within 11 months following the issuance of the final rule. For entities that are formed after the effective date of the rescission, the Commission expects the CPOs of such entities to comply with the Commission's regulations upon formation and commencement of operations.

3. Annual Notice of Exemption or Exclusion Requirement

[242] See Cranwood Letter.

The amendments will require annual reaffirmance of any claim of exemption or exclusion from registration as a CPO or CTA.[243] In the Proposal, the Commission stated that an annual notice requirement would promote transparency, a primary purpose of the Dodd Frank Act, regarding the number of entities either exempt or excluded from the Commission's registration and compliance programs. Moreover, the Commission stated that an annual notice requirement would enable the Commission to determine whether exemptions and exclusions should be modified, repealed, or maintained as part of the Commission's ongoing assessment of its regulatory scheme.

Two commenters suggested that the 30-day time period for filing was not adequate to enable firms to comply.[244] One commenter proposed a 60-day time period,[245] whereas the other commenter proposed 90 days as the necessary amount of time.[246] As a further cost-mitigating measure, and for the reasons discussed in section II.D, the Commission has elected to extend the filing period from 30 days to 60 days. Further, the Commission will adopt the annual notice requirement with one significant modification designed, among other things, to mitigate costs – that the notice be filed at the end of the calendar year and not the anniversary of the original filing. The Commission believes this alternative presented by a commenter will be more operationally efficient.[247]

d. Section 15(a)

In this section, the Commission considers the costs and benefits of its actions in light of five broad areas of market and public concern set forth in § 15(a) of the CEA: (1) protection of

[243] 76 FR 7976, 7986 (Feb. 12, 2011).

[244] See NFA Letter; and SIFMA Letter.

[245] See NFA Letter.

[246] See SIFMA Letter.

[247] See NFA Letter.

market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

1. Protection of Market Participants and the Public

Registration provides many benefits for both the registrants and their customers. The registration process allows the Commission to ensure that all entities participating in derivative markets meet a minimum standard of fitness and competency. The regulations governing who must register and what registrants must do provide clear direction for CPOs and CTAs. At the same time, clients wishing to invest with registered entities have the knowledge that such entities are held to a high financial standard through periodic account statements, disclosure of risk, audited financial statements, and other measures designed to provide transparency to investors. The Commission believes its regulations protect market participants and the public by requiring certain parties previously excluded or exempt from registration to be held to the same standards as registered operators and advisors, which ensures the fitness of such market participants and professionals.

Additionally furthering the goal of investor protection, NFA provides an on-line, public database with information on the registration status of market participants and their principals as well as certain additional registrant information such as regulatory actions taken by the NFA or Commission.[248] This information is intended to assist the public in making investment decisions regarding the use of derivatives professionals. Although those previously exempt entities may incur costs associated with registering and the compliance obligations arising therefrom, or may

[248] The National Futures Association's Background Affiliation Status Information Center (BASIC) is currently available at http://www.nfa.futures.org/basicnet/.

incur costs to inform the Commission of their exempt status, the Commission believes the benefits of transparency in the derivatives markets in the long term will outweigh these costs, which should decrease over time as efficiencies develop.

2. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

The amendments adopted herein will result in the registration of more CPOs and CTAs, which will enable the Commission to better oversee their activities in the derivatives markets, thereby protecting the integrity of the markets. Indeed, even including those entities still exempt under revised part 4 that are required to file notice with the Commission on an annual basis, the Commission will be able to better understand who is operating in derivatives markets and identify any threats to the efficiency, competitiveness, or integrity of markets. Moreover, because similarly situated entities in the derivatives markets will be subject to the same regulatory regime, the competitiveness of market participants will be enhanced.

3. Price Discovery

The Commission has not identified any impact on price discovery through the registration of additional CPOs and CTAs as a result of these regulations.

4. Sound Risk Management

The information the Commission gains from the registration of entities allows the Commission to better understand the participants in the derivatives markets and the interconnectedness of all market participants. Such an understanding allows the Commission to better assess potential threats to the soundness of derivatives markets and thus the financial system of the United States. The Commission also believes that the information required of registrants, to the extent that producing such information requires entities to examine their internal systems and

operations in a manner not previously assessed, provides registrants with an additional method of understanding the risk inherent in their day-to-day businesses.

5. Other Public Interest Considerations

The Commission has not identified any other public interest considerations impacted by the registration of additional CPOs and CTAs as a result of these regulations.

3. Data Collection

In these final rules, the Commission is enacting new § 4.27, which requires CPOs and CTAs to report certain information to the Commission on forms CPO-PQR and CTA-PR, respectively. The forms, reporting thresholds, and filing deadlines are further detailed in section II.F of this release.

a. Benefits of Data Collection

The Commission expects that the data collected from forms CPO-PQR and CTA-PR will increase the amount and quality of information available to the Commission regarding a previously opaque area of investment activity. Entities that are required to file all three schedules of the forms are large enough to have, potentially, a great impact on derivatives markets should such entities default, whereas smaller entities are required to file only basic demographic information. Because the data currently available to the Commission regarding CPOs and CTAs is limited in scope, the Commission does not have complete information as to who is transacting in derivatives markets. With the additional information that the Commission will have as a result of the new requirements under § 4.27, the Commission will be able to tailor its regulations to the needs of, and risks posed by, entities in the market, and to protect investors and the general public from potentially negative or overly risky behavior.

The Dodd-Frank Act charged the Commission, as a member of FSOC and as a financial regulatory agency, with mitigating risks that may impact the financial stability of the United States. The Commission is dedicated to assisting FSOC in that goal, and these final regulations are essential for the Commission to be able to fulfill that role effectively because the Commission cannot protect against risks of which it is not aware. By creating a reporting regime that makes the operations of commodity pools more transparent to the Commission, the Commission is better able to identify and address potential threats. The total benefit of risk mitigation as it pertains to the overall financial stability of the United States is not quantifiable, but it is significant insofar as the Commission may be able to use this data to prevent further future shocks to the U.S. financial system.

b. Costs of Data Collection

The Commission has not identified costs of data collection that are not associated with an information collection subject to the PRA. These costs therefore have been accounted for in the PRA section of this rulemaking and the information collection requests filed with OMB, as required by the PRA.

c. Section 15(a) Determination

This section analyzes the data collection rules according to the five factors set forth in section 15(a) of the CEA: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

1. Protection of Market Participants and the Public

The Commission believes that the information to be gathered from forms CPO-PQR and CTA-PR increases the amount and quality of information available regarding a previously opaque

area of investment activity and, thereby, enhances the ability of the Commission to protect investors and oversee derivatives markets. This enhanced ability provides a better understanding of the participants in derivatives markets and their operations, and as such, the Commission is better able to protect the public from the potential risk that large, unregulated entities could bring to markets under the Commission's jurisdiction, many of which are essential to society at large. Moreover, to mitigate reporting costs to regulated entities that may be registered both with the Commission and with the SEC, the regulations have been modified to allow dually registered entities to file only form PF (plus the first schedule A of form CPO-PQR) for all of their commodity pools, even those that are not "private funds." The cost mitigation has been accounted for in the PRA section of this rulemaking and the information collection requests filed with OMB, as required by the PRA.

2. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

Although the Commission does not believe this rule relates directly to the efficiency or competitiveness of futures markets, the Commission does recognize that the interconnectedness of the participants within derivatives markets can be extensive such that the proper oversight of each category of participants affects proper oversight of derivatives markets and the financial system as a whole. To the extent that the information collected by form CPO-PQR and form CTA-PR and the adopted amendments to the Commission's compliance regime assist the Commission in identifying threats in derivatives markets, the regulations herein protect the integrity of futures markets.

3. Price Discovery

The Commission has not identified any impact on price discovery as a result of this data collection initiative.

4. Sound Risk Management

The Dodd-Frank Act tasks FSOC and its member agencies (including both the SEC and the Commission) with mitigating risks to the financial stability the United States. The Commission believes these regulations are necessary to fulfill that obligation. These regulations improve the ability of the Commission to oversee the derivatives markets. As the Commission's understanding of the regulated entities, their behavior in derivatives markets, and the overall riskiness of their positions increases through the data collection in these rules, the Commission will be able to better understand any risks posed to the financial system as a whole arising from markets under the Commission's jurisdiction. These benefits are shared by market participants, at least indirectly, as a part of the United States financial system. In addition, CPOs and CTAs may benefit from these regulations to the extent that reporting form CPO-PQR and form CTA-PF requires such entities to review their firms' portfolios, trading practices, and risk profiles; thus, the CFTC believes that these regulations may improve the sound risk management practices within their internal risk management systems.

5. Other Public Interest Considerations

The Commission has not identified any other public interest considerations impacted by this data collection initiative.

4. Complementary Provisions

As part of these final regulations, the Commission is also adopting other amending provisions that complement the registration and data collection provisions, including changes to § 4.7, § 4.22, §§ 4.24 and 4.34, and parts 145 and 147. This section sets forth the Commission's consideration of related costs and benefits in general, responds to relevant comments, and then

analyzes the complementary provisions in light of the five factors enumerated in § 15(a) of the CEA.

a. Benefits of the Complementary Provisions

The provisions in this category amend additional sections of part 4 in order to improve the Commission's ability to effectively regulate derivatives markets and their participants. Some of these complementary provisions are specifically designed to protect investors, e.g., requiring certified annual reports and disclosure of swaps risk ensures investors are getting complete and accurate information regarding their investment, which increases consumer confidence in the financial system. As the information available to consumers becomes more accurate and complete, a prospective investor can more easily compare investment vehicles to choose the investment vehicle best suited to the investor's individual financial plan and risk tolerance.

Other provisions protect market participants by amending the Commission's internal procedures to provide for the confidentiality of certain proprietary information. Moreover, the Commission's planned harmonization rules are designed to limit the impact to entities regulated by multiple entities, protecting those participants from overly burdensome regulatory regimes.

b. Costs of the Complementary Provisions

The Commission has identified no costs of the complementary provisions that are not associated with an information collection subject to the PRA. These costs therefore have been accounted for in the PRA section of this rulemaking and the information collection requests filed with OMB, as required by the PRA.

c. Comments on the Complementary Provisions

1. § 4.7 Amendments

As stated previously, the Commission is adopting an amendment to § 4.7 that would rescind the relief provided in § 4.7(b)(3) from the certification requirement of § 4.22(c) for financial statements contained in commodity pool annual reports. The Commission received two comments regarding this proposed amendment. One commenter supported the proposed rescission and the Commission's stated justification for doing so. The other commenter recommended that the Commission retain an exemption from certification of financial statements for entities where the pool's participants are limited to the principals of its CPO(s) and CTA(s) and other categories of employees listed in § 4.7(a)(2)(viii). It is unclear how many of the pools operated under § 4.7 would qualify for such relief if adopted. The Commission is therefore unable to agree that such exclusions would materially reduce costs or increase any benefit achieved by the rule.

2. § 4.24 and § 4.34 Amendments

The Commission also proposed adding standard risk disclosure statements for CPOs and CTAs regarding their use of swaps to §§ 4.24(b) and 4.34(b), respectively. The Commission received three comments with respect to the proposed standard risk disclosure statement for swaps. Two argued that a standard risk disclosure statement does not beneficially disclose the risks inherent in swaps activity to participants or clients. A third recommended that the Commission consider whether the wording of the standard disclosure should be modified depending on whether the swaps were cleared or uncleared.

The Commission respectfully disagrees with the assertions of those commenters who believe that a standard risk disclosure statement is not beneficial. The Commission believes that a standardized risk disclosure statement addressing certain risks associated with the use of swaps is necessary due to the revisions to the statutory definitions of CPO, CTA, and commodity pool enacted by the Dodd-Frank Act. In addition, based on the language proposed, the Commission

does not believe that different language must be adopted to account for the differences between cleared and uncleared swaps. In particular, the Commission notes that the proposed risk disclosure statement is not intended to address all risks that may be associated with the use of swaps, but that the CPO or CTA is required to make additional disclosures of any other risks in its disclosure document pursuant to §§ 4.24(g) and 4.34(g) of the Commission's regulations. Moreover, the language of the proposed risk disclosure statement is conditional and does not purport to assert that all of the risks discussed are applicable in all circumstances.

For the reasons discussed above in section II.E and those stated in the Proposal, the Commission adopts the proposed risk disclosure statements for CPOs and CTAs regarding swaps. These additional risk disclosure statements will be required for all new disclosure documents and all updates filed after the effective date of this final rulemaking.

3. Harmonization of Regulations and Fund-of-Fund Investments

The Commission received numerous other comments regarding such subjects as harmonizing CFTC regulations with SEC regulations and fund of fund investments. These comments are discussed in detail in sections II.F.3 and 4 and adopted by reference herein.

4. Confidentiality of Submitted Data

Additionally, as the Commission stated in the Proposal, the collection of certain proprietary information through forms CPO-PQR and CTA-PR raises concerns regarding the protection of such information from public disclosure. The Commission received two comments requesting that the Commission treat the disclosure of a pool's distribution channels as nonpublic information, and numerous other comments urging the Commission to be exceedingly circumspect in ensuring the confidentiality of the information received as a result of the data collections.

The Commission agrees that the distribution and marketing channels used by a CPO for its pools may be sensitive information that implicates other proprietary secrets, which, if revealed to the general public, could put the CPO at a competitive disadvantage. Accordingly, and to mitigate costs and eliminate risks to participants, the Commission is amending §§ 145.5 and 147.3 to include question 9 of schedule A of form CPO-PQR as a nonpublic document. Additionally, the Commission is amending §§ 145.5 and 147.3 to remove reference to question 13 in Schedule A of Form CPO-PQR because that such question no longer exists due to amendments to that schedule. Similarly, the Commission will be designating subparts c. and d. of question 2 of form CTA-PR as nonpublic because it identifies the pools advised by the reporting CTA.

d. Section 15(a) Determination

This section considers these costs and benefits in light of the five broad areas of market and public concern set forth in section 15(a) of the CEA: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

1. Protection of Market Participants and the Public

The complementary provisions discussed in this section protect market participants and the public in a variety of ways. The changes under § 4.7 require entities to have their annual financial statements independently audited; such a requirement protects the investors in pools registered under § 4.7 by ensuring that the financial statements provided to participants are accurate and correct. As most CPOs registered under § 4.7 currently file audited annual reports, the burden to the industry as a whole will be relatively minor whereas the benefits, including increased consumer confidence, are likely to be large. The dollar value of improvements to overall accuracy of financial reporting is not quantifiable, but is a significant benefit.

Registered entities can remain confident in the confidentiality of their reports to the Commission, as the revised parts 145 and 147 protect proprietary information from being released to the public, while still giving the Commission needed information to protect derivatives markets and their participants.

The amending provisions that require similar information from CPOs transacting in swaps products and markets increase the Commission's awareness of transactions in the previously unregulated over-the-counter markets. That awareness will help to bring transparency to the swaps markets, as well as to the interaction of swaps and futures markets, protecting the participants in both markets from potentially negative behavior.

2. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

Although the Commission does not believe this part of these regulations has a direct impact on the efficiency of futures markets, the Commission does recognize that the protection of proprietary information is essential for the competitiveness and integrity of futures markets. The Commission believes that requiring all registered CPOs to provide participants and the Commission with annual financial statements that are certified by independent public accountants will increase the reliability of the information provided, which will serve to enhance the financial integrity of market participants, and by extension, the market as a whole. Moreover, the Commission also believes that requiring such certified statement of all registrants serves to make market participants more competitive as it enables prospective participants to more easily compare various investment vehicles.

3. Price Discovery

The Commission has not identified any impact on price discovery as a result of these regulations.

4. Sound Risk Management

The Commission has not identified any other impacts on sound risk management as a result of the other amending provisions that are different from the impacts of the registration and data collection initiatives described in sections III.A.3 and 4.

5. Other Public Interest Considerations

The Commission has not identified any other public interest considerations impacted by as a result of these regulations.

5. Conclusion

The Commission recognizes that the final regulations will impose some significant costs on the industry, as described above and in the PRA section. Notwithstanding the costs, the Commission has determined to adopt this rule because the Commission believes that proper regulation and oversight of market participants is necessary to promote fair and orderly derivatives markets.

List of Subjects

17 CFR Part 4

Advertising, Brokers, Commodity Futures, Commodity pool operators, Commodity trading advisors, Consumer protection, Reporting and recordkeeping requirements.

17 CFR Part 145

Commission Records and Information.

17 CFR Part 147

Open Commission Meetings.

Accordingly, 17 CFR Chapter I is amended as follows:

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

1. The authority citation for part 4 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 4, 6(c), 6b, 6c, 6l, 6m, 6n, 6o, 12a, and 23.

2. In § 4.5, add paragraphs (c)(2)(iii) and (c)(5) to read as follows:

§ 4.5 Exclusion from the definition of the term "commodity pool operator."

* * * * *

(c) * * *

(2) * * *

(iii) Furthermore, if the person claiming the exclusion is an investment company registered as such under the Investment Company Act of 1940, then the notice of eligibility must also contain representations that such person will operate the qualifying entity as described in Rule 4.5(b)(1) in a manner such that the qualifying entity:

(A) Will use commodity futures or commodity options contracts, or swaps solely for bona fide hedging purposes within the meaning and intent of Rules 1.3(z)(1) and 151.5 (17 CFR 1.3(z)(1) and 151.5); Provided however, That in addition, with respect to positions in commodity futures or commodity option contracts, or swaps which do not come within the meaning and intent of Rules 1.3(z)(1) and 151.5, a qualifying entity may represent that the aggregate initial margin and premiums required to establish such positions will not exceed five percent of the liquidation value of the qualifying entity's portfolio, after taking into account unrealized profits and unrealized losses on any such contracts it has entered into; and, Provided further, That in the case of an option that is in-the-money at the time of purchase, the in-the-money amount as defined in Rule 190.01(x) (17 CFR 190.01(x)) may be excluded in computing such five percent;

(B) The aggregate net notional value of commodity futures, commodity options contracts, or swaps positions not used solely for bona fide hedging purposes within the meaning and intent of Rules 1.3(z)(1) and 151.5 (17 CFR 1.3(z)(1) and 151.5), determined at the time the most recent position was established, does not exceed 100 percent of the liquidation value of the pool's portfolio, after taking into account unrealized profits and unrealized losses on any such positions it has entered into. For the purpose of this paragraph:

(1) The term "notional value" shall be calculated for each futures position by multiplying the number of contracts by the size of the contract, in contract units (taking into account any multiplier specified in the contract, by the current market price per unit, for each such option position by multiplying the number of contracts by the size of the contract, adjusted by its delta, in contract units (taking into account any multiplier specified in the contract, by the strike price per unit, for each such retail forex transaction, by calculating the value in U.S. Dollars for such transaction, at the time the transaction was established, excluding for this purpose the value in U.S. Dollars of offsetting long and short transactions, if any, and for any cleared swap by the value as determined consistent with the terms of 17 CFR part 45; and

(2) The person may net futures contracts with the same underlying commodity across designated contract markets and foreign boards of trade; and swaps cleared on the same designated clearing organization where appropriate; and

(C) Will not be, and has not been, marketing participations to the public as or in a commodity pool or otherwise as or in a vehicle for trading in the commodity futures, commodity options, or swaps markets.

* * * * *

(5) Annual notice. Each person who has filed a notice of exclusion under this section must affirm on an annual basis the notice of exemption from registration, withdraw such exemption due to the cessation of activities requiring registration or exemption therefrom, or withdraw such exemption and apply for registration within 30 days of the calendar year end through National Futures Association's electronic exemption filing system.

* * * * *

3. In § 4.7:

a. Revise paragraphs (a)(3)(ix), (a)(3)(x), and (b)(3) to read as follows:

§ 4.7 Exemption from certain part 4 requirements for commodity pool operators with respect to offerings to qualified eligible persons and for commodity trading advisors with respect to advising qualified eligible persons.

* * * * *

(a) * * *

(3) * * *

(ix) A natural person whose individual net worth, or joint net worth with that person's spouse at the time of either his purchase in the exempt pool or his opening of an exempt account would qualify him as an accredited investor as defined in Sec. 230.501(a)(5) of this title;

(x) A natural person who would qualify as an accredited investor as defined in S§ 203.501(a)(6) of this title;

* * * * *

(b) * * *

(3) *Annual report relief*. (i) Exemption from the specific requirements of § 4.22(c) of this part; Provided, that within 90 calendar days after the end of the exempt pool's fiscal year or the permanent cessation of trading, whichever is earlier, the commodity pool operator electronically

files with the National Futures Association and distributes to each participant in lieu of the financial information and statements specified by that section, an annual report for the exempt pool, affirmed in accordance with § 4.22(h) which contains, at a minimum:

(A) A Statement of Financial Condition as of the close of the exempt pool's fiscal year (elected in accordance with § 4.22(g));

(B) A Statement of Operations for that year;

(C) Appropriate footnote disclosure and such further material information as may be necessary to make the required statements not misleading. For a pool that invests in other funds, this information must include, but is not limited to, separately disclosing the amounts of income, management and incentive fees associated with each investment in an investee fund that exceeds five percent of the pool's net assets. The income, management and incentive fees associated with an investment in an investee fund that is less than five percent of the pool's net assets may be combined and reported in the aggregate with the income, management and incentive fees of other investee funds that, individually, represent an investment of less than five percent of the pool's net assets. If the commodity pool operator is not able to obtain the specific amounts of management and incentive fees charged by an investee fund, the commodity pool operator must disclose the percentage amounts and computational basis for each such fee and include a statement that the CPO is not able to obtain the specific fee amounts for this fund;

(D) Where the pool is comprised of more than one ownership class or series, information for the series or class on which the financial statements are reporting should be presented in addition to the information presented for the pool as a whole; except that, for a pool that is a series fund structured with a limitation on liability among the different series, the financial statements are not required to include consolidated information for all series.

(ii) *Legend*. If a claim for exemption has been made pursuant to this section, the commodity pool operator must make a statement to that effect on the cover page of each annual report.

* * * * *

4. In § 4.13:

a. Revise paragraphs (a)(3)(ii)(B)(*1*) and (*2*);

b. Remove and reserve paragraph (a)(4);

c. Revise paragraph (b)(1)(ii);

d. Redesignate paragraph (b)(4) as paragraph (b)(5) and add new paragraph (b)(4); and

e. Revise paragraph (e)(2) introductory text.

The revisions and additions read as follows:

§ 4.13 Exemption from registration as a commodity pool operator.

* * * * *

(a) * * *

(3) * * *

(ii) * * *

(B) * * *

(1) The term "notional value" shall be calculated for each futures position by multiplying the number of contracts by the size of the contract, in contract units (taking into account any multiplier specified in the contract, by the current market price per unit, for each such option position by multiplying the number of contracts by the size of the contract, adjusted by its delta, in contract units (taking into account any multiplier specified in the contract, by the strike price per unit, for each such retail forex transaction, by calculating the value in U.S. Dollars of such transaction, at the time the transaction was established, excluding for this purpose the value in U.S. Dollars of

offsetting long and short transactions, if any, and for any cleared swap by the value as determined consistent with the terms of part 45 of the Commission's regulations; and

(2) The person may net futures contracts with the same underlying commodity across designated contract markets and foreign boards of trade; and swaps cleared on the same designated clearing organization where appropriate; and

* * * * *

(b) * * *

(2) * * *

(ii) Contain the section number pursuant to which the operator is filing the notice (i.e., § 4.13(a)(1), (2), or (3)) and represent that the pool will be operated in accordance with the criteria of that paragraph; and

* * * * *

(4) Annual Notice. Each person who has filed a notice of exemption from registration under this section must affirm on an annual basis the notice of exemption from registration, withdraw such exemption due to the cessation of activities requiring registration or exemption therefrom, or withdraw such exemption and apply for registration within 30 days of the calendar year end through National Futures Association's electronic exemption filing system.

* * * * *

(e) * * *

(2) If a person operates one or more commodity pools described in paragraph (a)(3) of this section, and one or more commodity pools for which it must be, and is, registered as a commodity pool operator, the person is exempt from the requirements applicable to a registered commodity

pool operator with respect to the pool or pools described in paragraph (a)(3) of this section; Provided, That the person:

* * * * *

5. In § 4.14:

a. Revise paragraph (a)(8)(i)(D); and

b. Redesignate paragraph (a)(8)(iii)(D) as (a)(8)(iii)(E) and add a new paragraph (a)(8)(iii)(D).

The revision and addition read as follows:

§ 4.14 Exemption from registration as a commodity trading adviser.

* * * * *

(a) * * *

(8) * * *

(i) * * *

(D) A commodity pool operator who has claimed an exemption from registration under § 4.13(a)(3), or, if registered as a commodity pool operator, who may treat each pool it operates that meets the criteria of § 4.13(a)(3) as if it were not so registered; and

* * * * *

(iii) * * *

(D) Annual notice. Each person who has filed a notice of exemption from registration under this section must affirm on an annual basis the notice of exemption from registration, withdraw such exemption due to the cessation of activities requiring registration or exemption therefrom, or withdraw such exemption and apply for registration within 30 days of the calendar year end through National Futures Association's electronic exemption filing system.

* * * * *

6. In § 4.24, add paragraph (b)(5) to read as follows:

§ 4.24 General disclosures required.

* * * * *

(b) * * *

(5) If the pool may engage in swaps, the Risk Disclosure Statement must further state:

SWAPS TRANSACTIONS, LIKE OTHER FINANCIAL TRANSACTIONS, INVOLVE A VARIETY OF SIGNIFICANT RISKS. THE SPECIFIC RISKS PRESENTED BY A PARTICULAR SWAP TRANSACTION NECESSARILY DEPEND UPON THE TERMS OF THE TRANSACTION AND YOUR CIRCUMSTANCES. IN GENERAL, HOWEVER, ALL SWAPS TRANSACTIONS INVOLVE SOME COMBINATION OF MARKET RISK, CREDIT RISK, COUNTERPARTY CREDIT RISK, FUNDING RISK, LIQUIDITY RISK, AND OPERATIONAL RISK.

HIGHLY CUSTOMIZED SWAPS TRANSACTIONS IN PARTICULAR MAY INCREASE LIQUIDITY RISK, WHICH MAY RESULT IN A SUSPENSION OF REDEMPTIONS. HIGHLY LEVERAGED TRANSACTIONS MAY EXPERIENCE SUBSTANTIAL GAINS OR LOSSES IN VALUE AS A RESULT OF RELATIVELY SMALL CHANGES IN THE VALUE OR LEVEL OF AN UNDERLYING OR RELATED MARKET FACTOR.

IN EVALUATING THE RISKS AND CONTRACTUAL OBLIGATIONS ASSOCIATED WITH A PARTICULAR SWAP TRANSACTION, IT IS IMPORTANT TO CONSIDER THAT A SWAP TRANSACTION MAY BE MODIFIED OR TERMINATED ONLY BY MUTUAL CONSENT OF THE ORIGINAL PARTIES AND SUBJECT TO AGREEMENT ON INDIVIDUALLY NEGOTIATED TERMS. THEREFORE, IT MAY NOT BE POSSIBLE FOR THE COMMODITY POOL OPERATOR TO MODIFY, TERMINATE, OR OFFSET THE POOL'S OBLIGATIONS OR THE POOL'S EXPOSURE TO THE RISKS ASSOCIATED WITH A TRANSACTION PRIOR TO ITS SCHEDULED TERMINATION DATE.

* * * * *

7. In § 4.34, add paragraph (b)(4) to read as follows:

§ 4.34 General disclosures required.

* * * * *

(b) * * *

(4) If the commodity trading advisor may engage in swaps, the Risk Disclosure Statement must further state:

SWAPS TRANSACTIONS, LIKE OTHER FINANCIAL TRANSACTIONS, INVOLVE A VARIETY OF SIGNIFICANT RISKS. THE SPECIFIC RISKS PRESENTED BY A PARTICULAR SWAP TRANSACTION NECESSARILY DEPEND UPON THE TERMS OF THE TRANSACTION AND YOUR CIRCUMSTANCES. IN GENERAL, HOWEVER, ALL SWAPS TRANSACTIONS INVOLVE SOME COMBINATION OF MARKET RISK, CREDIT RISK, FUNDING RISK, AND OPERATIONAL RISK.

HIGHLY CUSTOMIZED SWAPS TRANSACTIONS IN PARTICULAR MAY INCREASE LIQUIDITY RISK, WHICH MAY RESULT IN YOUR ABILITY TO WITHDRAW YOUR FUNDS BEING LIMITED. HIGHLY LEVERAGED TRANSACTIONS MAY EXPERIENCE SUBSTANTIAL GAINS OR LOSSES IN VALUE AS A RESULT OF RELATIVELY SMALL CHANGES IN THE VALUE OR LEVEL OF AN UNDERLYING OR RELATED MARKET FACTOR.

IN EVALUATING THE RISKS AND CONTRACTUAL OBLIGATIONS ASSOCIATED WITH A PARTICULAR SWAP TRANSACTION, IT IS IMPORTANT TO CONSIDER THAT A SWAP TRANSACTION MAY BE MODIFIED OR TERMINATED ONLY BY MUTUAL CONSENT OF THE ORIGINAL PARTIES AND SUBJECT TO AGREEMENT ON INDIVIDUALLY NEGOTIATED TERMS. THEREFORE, IT MAY NOT BE POSSIBLE TO MODIFY, TERMINATE, OR OFFSET YOUR OBLIGATIONS OR YOUR EXPOSURE TO THE RISKS ASSOCIATED WITH A TRANSACTION PRIOR TO ITS SCHEDULED TERMINATION DATE.

* * * * *

8. Effective July 2, 2012, revise § 4.27, as added November 16, 2011, at 76 FR 71114, and effective March 31, 2012 to read as follows:

§ 4.27 Additional reporting by advisors of certain large commodity pools.

(a) *General definitions*. For the purposes of this section:

(1) *Commodity pool operator* or *CPO* has the same meaning as *commodity pool operator* defined in section 1a(11) of the Commodity Exchange Act;

(2) *Commodity trading advisor* or *CTA* has the same meaning as defined in section 1a(12);

(3) *Direct* has the same meaning as defined in section 4.10(f);

(4) *Net asset value* or *NAV* has the same meaning as *net asset value* as defined in section 4.10(b);

(5) *Pool* has the same meaning as defined in section 1(a)(10) of the Commodity Exchange Act;

(6) *Reporting period* means the reporting period as defined in the forms promulgated hereunder;

(b) *Persons required to report*. A reporting person is:

(1) Any commodity pool operator that is registered or required to be registered under the Commodity Exchange Act and the Commission's regulations thereunder; or

(2) Any commodity trading advisor that is registered or required to be registered under the Commodity Exchange Act and the Commission's regulations thereunder.

(c) *Reporting*. (1) Except as provided in paragraph (c)(2) of this section, each reporting person shall file with the National Futures Association, a report with respect to the directed assets of each pool under the advisement of the commodity pool operator consistent with appendix A to this part or commodity trading advisor consistent with appendix C to this part.

(2) All financial information shall be reported in accordance with generally accepted accounting principles consistently applied.

(d) *Investment advisers to private funds*. Except as otherwise expressly provided in this section, CPOs and CTAs that are dually registered with the Securities and Exchange Commission and are required to file Form PF pursuant to the rules promulgated under the Investment Advisers Act of 1940, shall file Form PF with the Securities and Exchange Commission in lieu of filing such other reports with respect to private funds as may be required under this section. In addition, except as otherwise expressly provided in this section, CPOs and CTAs that are dually registered with the Securities and Exchange Commission and are required to file Form PF pursuant to the

rules promulgated under the Investment Advisers Act of 1940, may file Form PF with the Securities and Exchange Commission in lieu of filing such other reports with respect to commodity pools that are not private funds as may be required under this section. Dually registered CPOs and CTAs that file Form PF with the Securities and Exchange Commission will be deemed to have filed Form PF with the Commission for purposes of any enforcement action regarding any false or misleading statement of a material fact in Form PF.

(e) *Filing requirements*. Each report required to be filed with the National Futures Association under this section shall:

(1)(i) Contain an oath and affirmation that, to the best of the knowledge and belief of the individual making the oath and affirmation, the information contained in the document is accurate and complete; Provided, however, That it shall be unlawful for the individual to make such oath or affirmation if the individual knows or should know that any of the information in the document is not accurate and complete and

(ii) Each oath or affirmation must be made by a representative duly authorized to bind the CPO or CTA.

(2) Be submitted consistent with the National Futures Association's electronic filing procedures.

(f) *Termination of reporting requirement*. All reporting persons shall continue to file such reports as are required under this section until the effective date of a Form 7W filed in accordance with the Commission's regulations.

(g) *Public records*. Reports filed pursuant to this section shall not be considered Public Records as defined in § 145.0 of this chapter.

9. Revise appendix A to part 4 to read as follows:

Appendix A to Part 4—Form CPO-PQR

[GPO—PHOTO—INSERT FORM CPO-PQR]

10. Add appendix C to part 4 to read as follows:

Appendix C to Part 4—Form CTA-PR

[GPO—PHOTO—INSERT FORM CTA-PR]

PART 145—COMMISSION RECORDS AND INFORMATION

11. The authority citation for part 145 continues to read as follows:

Authority: Publ. L. 99-570, 100 Stat. 3207; Pub. L. 89-554, 80 Stat. 383; Pub. L. 90-23, 81 Stat. 54; Pub. L. 98-502, 88 Stat. 156101564 (5 U.S.C. 552); Sec. 101(a), Pub. L. 93-463, 88 Stat. 1389 (5 U.S.C. 4a(j)).

12. In § 145.5, revise paragraphs (d)(1)(viii) and (h) to read as follows:

§ 145.5 Disclosure of nonpublic records.

* * * * *

(d) * * *

(1) * * *

(viii) The following reports and statements that are also set forth in paragraph (h) of this section, except as specified in 17 CFR 1.10(g)(2) or 17 CFR 31.13(m): Forms 1-FR required to be filed pursuant to 17 CFR 1.10; FOCUS reports that are filed in lieu of Forms 1-FR pursuant to 17 CFR 1.10(h); Forms 2-FR required to be filed pursuant to 17 CFR 31.13; the accountant's report on material inadequacies filed in accordance with 17 CFR 1.16(c)(5); all reports and statements required to be filed pursuant to 17 CFR 1.17(c)(6); and

(A)(*1*) The following portions of Form CPO-PQR required to be filed pursuant to 17 CFR 4.27: Schedule A: Question 2, subparts (b) and (d); Question 3, subparts (g) and (h); Question 9; Question 10, subparts (b), (c), (d), (e), and (g); Question 11; Question 12; and Schedules B and C;

(*2*) The following portions of Form CTA-PR required to be filed pursuant to 17 CFR 4.27: Question 2, subparts (c) and (d);

* * * * *

(h) Contained in or related to examinations, operating, or condition reports prepared by, on behalf of, or for the use of the Commission or any other agency responsible for the regulation or supervision of financial institutions, including, but not limited to the following reports and statements that are also set forth in paragraph (d)(1)(viii) of this section, except as specified in 17 CFR 1.10(g)(2) and 17 CFR 31.13(m): Forms 1-FR required to be filed pursuant to 17 CFR 1.10; FOCUS reports that are filed in lieu of Forms 1-FR pursuant to 17 CFR 1.10(h); Forms 2-FR required to be filed pursuant to 17 CFR 31.13; the accountant's report on material inadequacies filed in accordance with 17 CFR 1.16(c)(5); all reports and statements required to be filed pursuant to 17 CFR 1.17(c)(6); and

(1) The following portions of Form CPO-PQR required to be filed pursuant to 17 CFR 4.27: Schedule A: Question 2, subparts (b) and (d); Question 3, subparts (g) and (h); Question 9; Question 10, subparts (b), (c), (d), (e), and (g); Question 11; Question 12; and Question 13; and Schedules B and C;

(2) The following portions of Form CTA-PR required to be filed pursuant to 17 CFR 4.27: Question 2, subparts (c) and (d); and

* * * * *

PART 147—OPEN COMMISSION MEETINGS

13. The authority citation for part 147 continues to read as follows:

Authority: Sec. 3(a), Pub. L. 94-409, 90 Stat. 1241 (5 U.S.C. 552b); sec. 101(a)(11), Pub. L. 93-463, 88 Stat. 1391 (7U.S.C. 4a(j) (Supp. V, 1975)).

14. In § 147.3, revise paragraphs (b)(4)(i)(H) and (b)(8) to read as follows:

§ 147.3 General requirement of open meetings; grounds upon which meetings may be closed.

* * * * *

(b) * * *

(4)(i) * * *

(H) The following reports and statements that are also set forth in paragraph (b)(8) of this section, except as specified in 17 CFR 1.10(g)(2) or 17 CFR 31.13(m): Forms 1-FR required to be filed pursuant to 17 CFR 1.10; FOCUS reports that are filed in lieu of Forms 1-FR pursuant to 17 CFR 1.10(h); Forms 2-FR required to be filed pursuant to 17 CFR 31.13; the accountant's report on material inadequacies filed in accordance with 17 CFR 1.16(c)(5); all reports and statements required to be filed pursuant to 17 CFR 1.17(c)(6); the following portions of Form CPO-PQR required to be filed pursuant to 17 CFR 4.27: Schedule A: Question 2, subparts (b) and (d); Question 3, subparts (g) and (h); Question 9; Question 10, subparts (b), (c), (d), (e), and (g); Question 11; and Question 12; and Schedules B and C; and the following portions of Form CTA-PR required to be filed pursuant to 17 CFR 4.27: Question 2, subparts (c) and (d);

* * * * *

(8) Disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the Commission or any other agency responsible for the regulation or supervision of financial institutions, including, but not limited to the following

reports and statements that are also set forth in paragraph (b)(4)(i)(H) of this section, except as specified in 17 CFR 1.10(g)(2) or 17 CFR 31.13(m): Forms 1-FR required to be filed pursuant to 17 CFR 1.10; FOCUS reports that are filed in lieu of Forms 1-FR pursuant to 17 CFR 1.10(h); Forms 2-FR pursuant to 17 CFR 31.13; the accountant's report on material inadequacies filed in accordance with 1.16(c)(5); and all reports and statements required to be filed pursuant to 17 CFR 1.17(c)(6); and

(i) The following portions of Form CPO-PQR required to be filed pursuant to 17 CFR 4.27: Schedule A: Question 2, subparts (b) and D; Question 3, subparts (g) and (h); Question 10, subparts (b), (c), (d), (e), and (g); Question 11; Question 12; and Question 13; and Schedules B and C; and

(ii) The following portions of Form CTA-PR required to be filed pursuant to 17 CFR 4.27: Schedule B: Question 4, subparts (b), (c), (d), and (e); Question 5; and Question 6;

* * * * *

Issued in Washington, DC, on February 8, 2012, by the Commission.

David A. Stawick,
Secretary of the Commission

NOTE: The following appendices will not appear in the Code of Federal Regulations:

Appendices to Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations—Commission Voting Summary and Statements of Commissioners

Appendix 1- Commission Voting Summary

On this matter, Chairman Gensler, Commissioners Chilton, O'Malia and Wetjen voted in the affirmative; Commissioners Sommers voted in the negative.

Appendix 2- Statement of Chairman Gary Gensler

I support the final rule increasing the transparency to regulators of commodity pool operators (CPOs) and commodity trading advisors (CTAs) acting in the derivatives marketplace – for both futures and swaps. This rule reinstates the regulatory requirements in place prior to 2003 for registered investment companies that trade over a de minimis amount in commodities or market themselves as commodity funds. This rule enhances transparency in a number of ways and increases customer protections through amendments to the compliance obligations for CPOs and CTAs.

First, these amendments are consistent with the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), as these changes bring the swaps activities of CPOs and CTAs under the CFTC's oversight. If CPOs and CTAs are trading swaps, they will have to register with the Commission, giving their customers the benefit of the protections in the Dodd-Frank Act.

Second, these amendments addressed the concerns raised by the National Futures Association (NFA) in its petition requesting the Commission to reinstate Commission oversight of CPOs and CTAs for futures that existed prior to 2003. Since 2003, the participation of registered investment companies in commodity futures, swaps, and options markets has increased significantly. Some registered investment companies have been marketing commodity pools to retail investors and are operating without the supervision of the CFTC and the NFA. In addition, foreign advisors with U.S. customers have been exempt from supervision since 2003. The final rule reinstates the protections that futures customers of CPOs and CTAs had prior to the exemptions the Commission

granted in 2003. It is critical to bring the pools that have been in the dark since 2003 back into the light so their customers can benefit from the CFTC's oversight.

Third, the final rule increases transparency to regulators by enhancing data available to the Commission and the NFA, providing a much more complete understanding of how these pools are operating in the derivatives markets for futures and swaps. The data, which CPOs and CTAs will submit through Form CPO-PQR and Form CTA-PR, will help the Commission develop further regulatory protections for customers of these entities, market participants and the American public.

The Commission benefited from significant public comment on this rule. Some commenters raised questions about the definition of bona fide hedging under section 4.5, in particular that risk mitigation positions were not included in such bona fide hedging transactions. The final rule provides treatments consistent with the Commission's treatment of registered investment companies prior to 2003, and, in fact, this rule reinstates criteria in place before 2003. The Commission determined not to include risk management positions within the bona fide hedging exemption because many, if not most, positions in a portfolio could potentially be characterized as serving a risk management purpose. This would result in an overly broad exclusion from the definition of CPO.

Further, bona fide hedging transactions are excluded from determining whether a registered investment company has to register under 4.5, though these transactions are not excluded when determining whether commodity pools not registered with the Securities and Exchange Commission (SEC) will be required to register with the CFTC under section 4.13 (a)(3). With respect to the consideration of bona fide hedging positions under 4.13(a)(3), the Commission

previously stated its position that bona fide hedging positions should not be excluded within the de minimis exemption in 4.13(a)(3) when it proposed that rule. In the proposal for 4.13(a)(3) (68 FR 12622, 12627), the Commission stated its belief that 4.13(a)(3) should not differentiate between trading for bona fide hedging and non-hedging purposes because the rule is intended to apply to strictly de minimis situations, where trading is limited regardless of purpose. Conversely, the exclusion under 4.5 was not solely determined by the de minimis nature of the trading, but rather the combination of the de minimis amount of trading and the fact that the investment vehicle was otherwise regulated by the SEC. *See* 67 FR 65743.

Several commenters asked the Commission to reconsider the treatment of family offices under these rules. The Commission will continue to permit family offices to rely on existing guidance for family offices seeking relief from the requirements of Part 4. The Commission also is directing staff to look into the possibility of adopting a family offices exemption that is similar to the rule recently adopted by the SEC and is soliciting comment from the public.

Appendix 3- Dissenting Statement of Commissioner Jill E. Sommers

The amendments to the Commission's Part 4 regulations we are adopting with these final rules were prompted by a petition from the NFA seeking to reinstate certain operating restrictions that were in place prior to 2003 for entities excluded from the definition of CPO under § 4.5. Had we limited the amendments to address the issues raised by the NFA's petition, we could have met our regulatory objectives without disrupting a significant number of business structures. I would have

supported such an approach. As it is, we have gone far beyond what was needed to resolve NFA's concerns and I must dissent.

Section 404 of the Dodd-Frank Act requires certain advisors of private funds to register with the SEC and to report to the SEC information "as necessary and appropriate . . . for the protection of investors or for the assessment of systemic risk by the Financial Stability Oversight Council." With the finalization of these rules, the Commission has determined that the "sources of risk delineated in the Dodd-Frank Act with respect to private funds are also presented by commodity pools" and that registration of certain previously exempt or excluded CPOs is therefore necessary "to assess the risk posed by such investment vehicles in the derivatives markets and the financial system generally." The Commission states that the data it will collect as a consequence of registration is necessary "in order to fulfill the Commission's systemic risk mitigation mandate." While I agree that the Commission has a regulatory interest in the activities of commodity pools, this overstates the case and gives a false impression that the data we gather will enable us to actively monitor pools for systemic risk, that we have the resources to do so, and that we will do so. Moreover, Congress was aware of the existing exclusions and exemptions for CPOs when it passed Dodd-Frank and did not direct the Commission to narrow their scope or require reporting for systemic risk purposes. The Commission justifies the new rules as a response to the financial crisis of 2007 and 2008 and the passage of Dodd-Frank, yet there is no evidence to suggest that inadequate regulation of commodity pools was a contributing cause of the crisis, or that subjecting entities to a dual registration scheme will somehow prevent a similar crisis in the future.

I could nevertheless support a revision of the current exclusions and exemptions that would give us access to information we determine is necessary to carry out our regulatory mission if supported by a sufficient cost-benefit analysis. The rationale underlying a number of the decisions encompassed by the rules is sorely lacking, however, and is not supported by the existing cost-benefit analysis. The Commission concludes, for example, that bona fide hedging transactions are unlikely to present the same level of risk as risk mitigation positions because they are offset by exposure in the physical markets. A risk mitigation position is, by definition, a position that mitigates or "offsets" exposure in another market. Both are hedges and there is no explanation as to why the Commission believes that bona fide hedges are less risky. The preamble states that the alternative net notional test under § 4.5 is meant to be consistent with the net notional test set forth in § 4.13(a)(3), except the § 4.5 test allows unlimited use of futures, options or swaps for bona fide hedging purposes, while the § 4.13(a)(3) test does not. No explanation is given for the differing treatment. We reject an exemption for foreign advisors similar to the exemption allowed by the Investment Advisors Act of 1940 under Section 403 of Dodd-Frank because we lack information on the activities of foreign pools, even though, as some commenters observed, this may result in nearly all non-U.S. based CPOs operating a pool with at least one U.S. investor having to register and report all of their derivatives activities to the Commission, including activity that may be subject to comparable foreign regulation. While we leave open the possibility of future exemptions based on information we collect on Forms CPO-PQR and CTA-PR, the more likely result of this new policy is that U.S. participants will be excluded from investing in foreign pools. The Commission may have good reasons for this course of action, but no rationale is given.

Our "split the baby" approach on the issue of family offices is illogical. The Commission states that it is "essential that family offices remain subject to the data collection requirements" to fulfill our regulatory mission and to develop a comprehensive view of such firms to determine whether an exemption may be appropriate in the future. At the same time, we are allowing an unknown percentage of family offices to rely on previously issued interpretive letters to avoid registration, reporting and other compliance obligations. This makes no sense. We either need this data or we do not. Family offices may fit within the parameters of the existing interpretive letters, in which case we will not develop the comprehensive view we are seeking. On the other hand, we ignore the fact that we have consistently found, for more than three decades, that family offices are not the type of collective investment vehicle that Congress intended to regulate in adopting the CPO and commodity pool definitions, a finding that Congress confirmed in § 409 of Dodd-Frank with respect to investment advisors. Moreover, our repeal of the family office exemption is inconsistent with the exclusion recently adopted by the SEC pursuant to § 409 at a time when Dodd-Frank has urged us to harmonize our rules to the fullest extent possible.

It is unlikely, in my view, that the cost-benefit analysis supporting the rules will survive judicial scrutiny if challenged. And, although I am relieved that the recordkeeping, reporting and disclosure obligations required by the rules will be delayed until after proposed harmonization rules are finalized, the rules contain a confusing and needlessly complicated set of compliance dates for other provisions.

While I have felt that many of the rules we have finalized in the last few months were far too overreaching, our justification that a particular rule was required by statute was largely accurate.

With regard to these rules the same justification does not hold true. These rules are not mandated by Dodd-Frank, and I do not believe that the benefits articulated within the final rules outweigh the substantial costs to the fund industry. We admit in the preamble that we do not have enough information to determine the validity of requiring some of these entities to register. A more prudent approach would have been to gather the information first and then decide what constitutes sound policy. For these and other reasons, I cannot support the final rules.

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